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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-486

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.), INC.,
a corporation, *Petitioner*

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

VIRGIN ISLANDS WATER & POWER AUTHORITY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Virgin Islands Hotel Association (U.S.), Inc. prays that a writ of certiorari issue to review the final decree of the United States Court of Appeals for the Third Circuit entered May 23, 1973 (Case No. 72-1996), denying Petitioner's petition for rehearing.

INTRODUCTION

The genesis of this case is a ratemaking proceeding conducted by the Virgin Islands Water & Power Authority (hereafter "the Authority"), a publicly-owned utility serving the whole of the Virgin Islands. Adjudicatory hearings were denied and the hearings

afforded, although purportedly legislative in nature, were a pretense. They contributed nothing to the rate-making process and had none of the elements of fair play. Yet, the hearings were deemed adequate by the court below, despite the hearing procedure mandated by § 105(a)(12) of the Virgin Islands Water & Power Authority Act, 30 V.I.C. 101, *et seq.* (1964)[1] and the procedural safeguards assured by the Due Process Clause of the Fourteenth Amendment.[2]

Affecting the Authority alone, this is a particularized proceeding. A self-regulating publicly-owned utility, because of its inherently conflicting proprietary and regulatory functions, must be held to procedural safeguards at least as rigorous as those required for regulatory agencies having jurisdiction over the rates of privately-owned utilities, and such agencies have traditionally been required to afford trial-type rate hearings. Investors and ratepayers of privately- and publicly-owned utilities, alike, are entitled to procedural due process to ensure the establishment of reasonable rates.

The Third Circuit Court of Appeals nevertheless approved the meaningless hearings afforded here. Relying basically on the reasoning of this Court in *United States v. Florida East Coast Railway Co.*, 93 S. Ct. 810 (1973), the court held that the proceeding was generalized and that, if the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (1957) were applicable (although it is *in*applicable to the Virgin Islands), a rulemaking hearing would be required. It also held that cross-

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[1] App. A, pp. 1a, 12a.

[2] That Amendment was extended to the Virgin Islands by § 3 of the Revised Organic Act of the Virgin Islands of 1954, as amended, 48 U.S.C.A. § 1561.

examination was properly denied because of the absence of "any specific statutory procedures such as the Administrative Procedure Act . . . [which] necessitates greater leeway" in the courts,[3] and because of the failure of the Authority to demonstrate that it had been prejudiced by the denial of oral cross-examination. Accordingly, the court below concluded that the Authority's sham hearings had properly been approved. This is a shocking decision which jettisons 100 years of case law assuring constitutional procedural safeguards in traditional utility ratemaking proceedings.

By its silence, the court below also sanctioned utility rates which are substantially higher than necessary to produce a reasonable general level of income and which are unduly discriminatory, although the full extent of the excessiveness and the undue discrimination is unknown because of an incomplete record caused by the Authority's refusal to meet its burden of proof. The court thereby discarded the principle of constitutional law established by this Court in *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), and reflected in 30 V.I.C. § 105(a)(12), for the administrative determination of fair and reasonable rates.

If the decision below stands, it could mark the beginning of the end of traditional utility ratemaking procedures and principles; it would render the Authority Act, especially § 105(a)(12), ineffectual.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals, issued April 12, 1973, is reported in 476 F.2d 1263 (1973) and is printed

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[3] App. G, pp. 73a-74a.

in Appendix G to this Petition, p. 65a. An order denying rehearing was issued May 23, 1973, and is printed in Appendix H to this Petition, p. 80a. The initial opinion of the court of appeals is reported in 465 F.2d 1272 (1972) and is printed in Appendix D, p. 51a.

The final order of the District Court of the Virgin Islands, entered October 3, 1972, is unreported; it is printed in Appendix F, p. 63a. The opinion of the district court, February 2, 1972, is reported at 54 F.R.D. 337 (1972), and is printed in Appendix C, p. 35a.

JURISDICTION

The jurisdiction of the district court was invoked under 4 V.I.C. § 74(5). The judgment of the Court of Appeals for the Third Circuit was entered on April 12, 1973; jurisdiction was based on 28 U.S.C. § 1291. An order of this Court, dated July 24, 1973, extended the time for filing a petition for writ of certiorari to September 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTIONS PRESENTED

1. Whether the Authority is required by 30 V.I.C. § 105(a)(12) and by procedural due process to conduct adjudicatory hearings in its ratemaking proceedings, rather than the legislative-type hearings accorded; or, if legislative-type hearings are legally permissible, whether the Authority can lawfully accord legislative-type hearings which deny all procedural safeguards and are otherwise meaningless.

2. Whether the Authority can properly make a determination of reasonable electric power rates under 30 V.I.C. § 105(a)(12) and the Fourteenth Amendment

of the Constitution without proving that its projected electric revenue requirements are justified by reasonable costs of its electric operation and applicable debt service requirement and without proving that its electric rate schedules are devoid of unfairness and undue discrimination; in other words, whether the Authority can lawfully disregard its statutory ratemaking standard of "reasonable rates".[4]

STATUTE INVOLVED

The statutory provisions primarily involved are §§ 101(f), 105(a), and 105(a)(12) of the Virgin Islands Water & Power Authority Act, Title 30 Virgin Islands Code § 101, *et seq.* (1964). The Act is printed in its entirety in Appendix A, p. 1a.

STATEMENT OF THE CASE

On November 10, 1971, the Authority announced that its electric power rates would be increased effective December 1, 1971, the increases having been recommended by the consulting firm of Jackson & Moreland in a "revenue report", dated October 31st.[5] Legislative-type "hearings" were held the week of November 14th, and on December 3, 1971, the Authority readopted the increased rates. On the same day, the Virgin Islands Hotel Association (U.S.), Inc. (hereafter "the Association") filed for an injunction against the increased rates on behalf of its members which comprise most of

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[4] 30 V.I.C. § 105(a)(12).

[5] This report found a minimum 10% increase in revenues necessary "to overcome the estimated deficiency as of fiscal 1972," but to accomplish "the benefits for the entire fiscal year," an adjusted minimum of 15.2% was desirable, yet to allow for contingencies for future increases in expenses and for financing," rates yielding "increased revenues of approximately 20 percent" were projected.

the hotels in the Virgin Islands. It alleged that the Authority had "acted in gross disregard of the Authority Act and of procedural due process."[6] On the basis of the first two *Morgan* cases[7] and the hearing requirement of 30 V.I.C. 105(a) (12),[8] the court held that the Authority's hearings denied the Association's members "requisite procedural due process safeguards".[9] It also held that the Authority's rate action was not "reasonable and permissible", having been based on a revenue study rather than a rate study.[10] The court enjoined the increased rates and stayed the injunction for ten months to enable the Authority to make a "proper determination of a rate schedule" with a supporting "rate study" and to hold "proper hearings."[11]

The court of appeals agreed that the Authority's hearings did not accord with 30 V.I.C. § 105(a)(12) but held that "meaningful", rather than adjudicatory,

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[6] App. C, p. 35a.

[7] *Morgan v. United States*, 298 U.S. 468, 480 (1936); *Morgan v. United States*, 304 U.S. 1, 18, reh. den. 304 U.S. 23 (1938); App. C, p. 43a.

[8] This provision requires the Authority

> "to *determine* . . . reasonable rates . . . for electric power . . . Provided, . . . That . . . before changes in such general rate structures are made . . . *a public hearing shall be held with respect thereto* before the Board or before such *hearing officer* . . . as the Board may designate to give interested persons an opportunity to advise the Board of their views and *evidence* in support thereof, and *upon such hearing* . . . to alter, suspend or revoke such changes." [Emphasis added]

[9] App. C, pp. 42a-44a; Finding Nos. 8, 9, 10, 12, App. C, pp. 47a-48a; Conclusion Nos. 5 and 6, App. C, p. 48a.

[10] App. C, pp. 41a-42a; Finding Nos. 6, 7 and 11, App. C, pp. 47a-48a.

[11] App. C, p. 44a, 49a-50a.

hearings are mandated.[12] It also disagreed that the Authority has a duty under 30 V.I.C. § 105(a)(12) to make "rate studies as such" and ordered the district court's judgment modified accordingly.[13]

On remand, the Authority again held legislative-type "hearings". They differed from the original hearings essentially in that they were conducted by a member of the Authority's Governing Board which had twice previously approved the increased rates, the Authority presented three new engineering reports, and only written questions were permitted of the reports' authors. All of the reports fell far short of successfully justifying the projected electric revenue requirements in terms of reasonable electric operating costs (including financing costs) and the applicable debt service requirement;[14] they failed to attempt to establish that the increased

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[12] The court said:

> "The rate-fixing procedure created by 30 V.I.C. § 105(a)(12) contemplates a *meaningful* public hearing at which interested persons can present their views and present *evidence in support thereof*. Concomitant with such a hearing are the essential requirements of adequate notice, dissemination to the public of facts and figures on which the Authority relies, and an opportunity afforded to those attending the hearing to rebut such facts and figures." (App. D, pp. 56a-57a.)

[13] App. D, pp. 56a, 57a-58a.

[14] The updated Jackson & Moreland study shows on its face that the increased rates would yield debt service coverage for fiscal 1973 of 2.34, compared with the "acceptable" coverage of 1.92 estimated in its October 1971 study, and the coverage of 1.50 required by the Authority's bond covenants. The result of the study indicates that, out of $3,550,000 in increased revenues, at least $1,316,000 (or 37%) are in excess of those needed to provide a coverage of 1.92. of which at least $1,240,000 is attributable to the increased rates for Large Power Users, the class comprised mainly of the Association's members.

The report of D.S.S. Engineers, Inc. shows on its face that $100,000 in costs attributable to water had been improperly allo-

rate schedules were fair and devoid of undue discrimination.[15] Objections by the Association to the hearing procedure and its contentions that the reports were inadequate were to no avail. Specifically, the Association objected to the inadequate 5-week hearing notice and dissemination, to the Authority's failure to meet its burden of proof (as a cure for which the Association moved for a two-month continuance within the stay period to enable the Authority to assemble necessary data from its raw statistical and financial records and to enable its rate expert to prepare testimony for the Association based upon such data), to the Authority's failure to have its witnesses sworn, to the substitution of written questions for oral cross-examination, to the denial of an opportunity for rebuttal, and in general, to the denial of a trial-type hearing. The Association's counsel was permitted, however, to make offers of proof as to what the Association would have established had it been given an opportunity to cross-examine the Authority's witnesses under oath and to present rebuttal testimony.

Without making any adjustments for the evidence of record that the increased rates were excessive and unduly discriminatory, the Authority, on September 18, 1972, again readopted the increased rates. In accordance with strictures believed to have been imposed

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cated to power. It reflects, moreover, no allocations to water for administrative expenses, depreciation, interest on debt and applicable debt capital.

In spite of the showings in the other two reports, the report of R. W. Beck & Associates found the increased rates "fair and reasonable."

[15] The increases by classes were: residential, 18.8%; commercial, 18.8%; street lights, 20.2%; large power (including the Association's members), 24.8%. (App. D, p. 52a, n. 1.)

on it by the court of appeals, the district court issued a final order on October 3, 1972, finding that the Authority had conducted public hearings consistent with the judgment of the court of appeals, and vacating its injunction.

In a decision dated April 12, 1973, a different panel of the court of appeals sustained the district court, basically in reliance on *United States v. Florida East Coast Railway Co., supra.* Using the Administrative Procedure Act for guidance, with only cursory note of 30 V.I.C. § 105(a)(12), and treating *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441 (1915) as applicable here, the court of appeals held that the Authority's rate hearings were required to be rulemaking not adjudicatory hearings. The court considered the hearing procedure on remand proper; this would be so even though adjudicatory facts were involved; and, assuming adjudicatory hearings were required, the procedure would still have been proper, at least with respect to the denial of an opportunity for cross-examination of the Authority's experts, because, in the absence of a local statute such as the Administrative Procedure Act, the courts have "greater leeway", and because the Association had not shown that it had been prejudiced thereby.[16]

Other aspects of the Authority's procedure expressly condoned were the notice and dissemination afforded,[17] the use of unsworn testimony,[18] and the denial of the Association's motion for a continuance.[19] The court also

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[16] App. G, p. 74a.

[17] App. G, pp. 70a-71a.

[18] App. G, p. 71a, n. 9.

[19] App. G, p. 71a.

held that the conduct of the hearings by a member of the Authority's Governing Board was not improper, and finally, that the Authority had not relied on evidence outside the record.[20] Thus, while purporting to affirm the initial holding of the court of appeals that a "meaningful" hearing was mandated by 30 V.I.C. § 105(a)(12), the court below approved the "hearings" afforded on remand. On May 23, 1973, the court of appeals denied the Association's petition for rehearing.

The questions involved are questions of law. No facts are in dispute.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Decided Important Questions of Statutory Hearing Procedure and Procedural Due Process in a Traditional Administrative Utility Ratemaking Proceeding in a Way Which So Far Departs From Applicable Decisions of This Court as to Call for the Exercise of This Court's Supervisory Power.

1. The decision below seriously misconstrues and misapplies United States v. Florida East Coast Railway Co., 93 S. Ct. 810 (1973).

The court below misapplied the holding of this Court in *Florida East Coast* that, as a matter of procedural due process, the "basic distinction" between rulemaking and adjudicatory proceedings is whether the proceedings are particularized (as in *Londoner v. Denver*, 210 U.S. 373 (1908)), or generalized (as in *Bi-Metallic Investment Co. v. State Board of Equalization*, *supra*).[21] It conceived the Authority's rate proceeding to be generalized because it affects the general public[22] —as, indeed, all administrative ratemaking proceed-

[20] App. G, pp. 74a-75a.

[21] 93 S. Ct. at 820-821.

[22] App. G, pp. 72a-73a.

ings do. In this instance, however, the proceeding affects the Authority alone, not a multiplicity of persons subject to regulation. If the reasoning of the court of appeals were to prevail, all utility ratemaking proceedings would have to be legislative in nature, including those involving ratemaking for privately-owned utilities, whereas trial-type hearings have traditionally been required. (*Infra,* pp. 15-19)

Further, in determining which of the two types of hearings is mandated by 30 V.I.C. § 105(a)(12), the court below sought guidance from the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*[23] Following the reasoning of *Florida East Coast,* the court concluded that "if the Administrative Procedure Act governed the Authority's ratemaking, the appropriate procedure would be rulemaking . . .".[24]

But there is no ambiguity in the hearing procedure prescribed by 30 V.I.C. § 105(a)(12) to warrant seeking guidance from any other statute, let alone basis in *Florida East Coast* for resorting to the Administrative Procedure Act from which the Authority, a *territorial* agency, is exempt.[25] While this Court there held the Administrative Procedure Act to be "a satisfactory basis for determining what is meant by the term 'hearing' used in another statute," 93 S.Ct. at 818, the other statute involved was a *federal* statute.

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[23] The cases cited by the court fail to support its fallacious distinction between rulemaking and adjudicatory proceedings. App. G, pp. 72a-74a.

[24] App. G, p. 72a. In this connection, it is to be noted that the court below considered the prospective effectiveness of rates as a governing distinction here regardless of the nature of the proceeding.

[25] 5 U.S.C. § 551.

Assuming, *arguendo,* the applicability of the Administrative Procedure Act, the court's conclusion that the appropriate type of hearing would be rulemaking should not have ended the matter, for § 553(c) of that Act requires an adjudicatory hearing if rulemaking is "required by statute to be made on the record after opportunity for an agency hearing." The language of 30 V.I.C. § 105(a)(12) is equivalent to the "on the record" language in § 553(c) of the Administrative Procedure Act. It states that "a public hearing shall be held . . . and upon such hearing," changes in the rate structure may be made. Unlike the "after hearing" language in § 1(14)(a) of the Interstate Commerce Act at issue in *Florida East Coast,* the "upon such hearing" language of the Authority Act should have triggered the adversary hearing requirements of the Administrative Procedure Act in rulemaking proceedings.[26]

Yet, the court below ignored this triggering language. It thereby acted in disregard of this Court's holding in *Florida East Coast,* 93 S.Ct. at 817:

> "Inextricably intertwined with the hearing requirement of the Administrative Procedure Act in this case is the meaning to be given to the language 'after hearing' in § 1(14)(a) of the Interstate Commerce Act."

In *Florida East Coast,* moreover, this Court distinguished the hearing procedure at issue there from that at issue in the second *Morgan* case, *supra,* which it thought defective, 93 S.Ct. at 819,

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[26] *United States v. Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972), discussed and distinguished in *Florida East Coast,* 93 S. Ct. at 819.

> "primarily because the persons who were to be affected by the Secretary's order were found not to have been adequately apprised of what the Secretary proposed to do prior to the time that he actually did it."

The Authority's hearing procedure on remand (with its inadequate notice of the factual issues involved and incomplete record due to the Authority's refusal to meet its burden of proof [27]) failed to apprise those likely to be affected by the increased rates of the basis for the Authority's claim that the rates were reasonable; they were thereby effectively denied the hearing required by statute. Thus, the Authority's hearings suffered from the same "essential formlessness" as those in *Morgan,* by virtue of which this Court distinguished its decision in *Florida East Coast.* But, the court below ignored that fundamental difference and justified its sanction of the Authority's rulemaking hearings. On the one hand, it attempted to distinguish the first *Morgan* case, [28] and on the other, it speciously implied that *Florida East Coast* had discarded the rule of the second *Morgan* case requiring trial-type hearings in traditional administrative ratemaking proceedings as a matter of procedural due process.[29]

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[27] *Commonwealth of Puerto Rico v. F.M.C.*, 468 F.2d 872, 881-882 (D.C. Cir. 1972).

[28] App. G, p. 70a, n. 7.

[29] App. G, p. 77a, n. 1. Other significant differences between *Florida East Coast* and this case were also disregarded by the court below. Thus, unlike the proceeding in *Florida East Coast,* (1) there was no overriding urgency here warranting less than trial-type hearings; (2) there were no "meaningful" hearings here of any sort, either rulemaking or adjudicatory; and (3) there was no open-endedness in the Authority's proceeding.

Still another misapplication of *Florida East Coast* by the court below is its equation of the substitution there of a written submission for oral argument under the exception in § 556(d) of the Administrative Procedure Act with the substitution here of written questions for cross-examination, leading to the conclusion that, because the Association had not shown that it had been prejudiced by the substitution (as per § 556(d)), it would not reverse the district court.[30]

In sanctioning the substitution involved in *Florida East Coast*, this Court said, 93 S. Ct. at 819:

> "... the Act makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by *evidentiary* submissions in written form only." (Emphasis added)

But written questions are not evidentiary submissions. Moreover, they are proscribed in trial-type rulemaking hearings by § 556(d):

> "A party is entitled . . . to conduct such *cross-examination* as may be required for a full and true disclosure of the facts." (Emphasis added)

Rather than contributing to full and fair disclosure of the facts here, denial of cross-examination prevented exposure of the full extent of the excessiveness of the Authority's increased rates and contributed to the Authority's withholding of evidence of unfairness and undue discrimination in its increased rate schedules. This result is certainly not attributable to *Florida East Coast*, nor for that matter, to greater judicial "leeway", if any, arising out of the absence of a local statute such as the Administrative Procedure Act.[31]

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[30] App. G, p. 74a.

[31] App. G, pp. 73a-74a.

Even in generalized rulemaking proceedings under the Administrative Procedure Act, "basic considerations of fairness" or a "meaningful opportunity to be heard" may dictate oral presentations in lieu of written submissions, and perhaps cross-examination. *Walter Holm & Company v. Hardin,* 449 F.2d 1009, 1016 (D.C. Cir.1971); *American Airlines, Inc. v. C.A.B.,* 359 F.2d 624, 631-632 (D.C. Cir. 1966); *International Harvester Company v. Ruckelshaus,* 478 F.2d 615, 631 (D.C. Cir. 1973).

Whether rulemaking or adjudicatory proceedings are deemed to be called for, the Authority's hearings were a pretense; they were in no sense either fair or meaningful. They satisfy neither the requirements of 30 V.I.C. § 105(a)(12) nor procedural due process.

2. The decision is in conflict with applicable decisions of this Court.

a. Decisions of this Court require trial-type hearings, including cross-examination, in administrative utility ratemaking proceedings.

As already noted, where administrative actions involve resolution of factual issues concerning particular parties, the established principle, grounded in due process, requires a trial-type hearing. *Opp Cotton Mills v. Administrator of Wage & Hour Division of the Department of Labor,* 312 U.S. 126, 152-153 (1941). This Court has held this principle applicable in ratemaking proceedings in order to ensure the fair and reasonable rates intended to result from open, public decision-making. *F.P.C. v. Natural Gas Pipeline Co.,* 315 U.S. 575, 582-583 (1942); *Morgan v. United States, supra,* 304 U.S. at 19-20; *Morgan v. United States, supra,* 298 U.S. at 477-482; *I.C.C. v. Louisville & Nashville Railroad Co.,* 227 U.S. 88, 91-94 (1913). Trial-type hearings have been described as an important proce-

dural "safeguard" against arbitrary agency ratemaking. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U.S. 292, 304-305 (1937). In all the above cases and many others, trial-type hearings have been afforded in a ratemaking context.[32]

Ratemaking by a publicly-owned utility is a regulatory function separate from its proprietary function. In the exercise of both functions, it is obliged to act in the public interest. *Springfield Gas & Electric Co. v. Springfield,* 257 U.S. 66, 70 (1921). However, the identity of regulator and proprietor constitutes a conflict of interest which can lead to an intrusion of the proprietary interest upon the exercise of the regulatory function, at the expense of the ratepayers. Thus, the difference between independent public regulation of privately-owned utilities and self-regulation by publicly-owned utilities necessitates stricter procedural safeguards in the latter case.[33] Notwithstanding the identity here of regulator and proprietor, the court of

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[32] *E.g., In re Permian Basin Area Rates Cases,* 390 U.S. 747 (1968); *Market St. Ry. Co. v. Railroad Comm'n of California,* 324 U.S. 548 (1945); *Vinson v. Washington Gas Light Co.,* 321 U.S. 489 (1944); *St. Joseph Stockyards Co. v. United States,* 298 U.S. 38 (1936); *West Ohio Gas Co. v. Public Util. Comm'n of Ohio,* 294 U.S. 63 (1935); *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n of California,* 289 U.S. 287 (1933); *Wichita Railroad & Light Co. v. Public Util. Comm'n of Kansas,* 260 U.S. 48 (1922); *Darnell v. Edwards,* 244 U.S. 564 (1917). And see the reasoning developed and cases cited in *Jordan v. American Eagle Fire Ins. Co.,* 169 F. 2d 281 (D.C. Cir. 1948).

[33] The court of appeals attempted to distinguish the first *Morgan* case, which concerned rates regulated producers could charge, from this case concerning rates the Authority, a self-regulating utility, can charge. The court concluded that the former situation poses a greater danger for uncompensated taking and, therefore, demands stricter procedural due process. App. G, p. 70a, n. 7. That reasoning is plainly unsound.

appeals denied the need for trial-type hearings in this particularized ratemaking proceeding.

One of the most important attributes of trial-type rate hearings is cross-examination. *Market St. Ry. Co. v. Railroad Commission of California, supra; cf. F.P.C. v. Natural Gas Pipeline Co., supra,* 315 U.S. at 583-584. In *Market Street,* while approving street car rates set by a regulatory commission, this Court noted, 324 U.S. at 562:

> "Due process, of course, requires that commissions proceed on matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal."

The protection against arbitrary ratemaking afforded by cross-examination and rebuttal is important in proceedings where rules of evidence are liberally applied. *I.C.C. v. Louisville & Nashville Railroad Co., supra,* 227 U.S. at 93.[34] By divorcing cross-examination from rebuttal, the court of appeals stripped rebuttal of much of its efficacy.

The opportunity for cross-examination is particularly important where there is a strongly contested factual dispute and the inadequacy of one party's factual contentions might not be apparent otherwise.[35] *I.C.C. v. Louisville & Nashville Railroad Co., supra,* 227 U.S. at 93-94. In *Goldberg v. Kelly,* 397 U.S. 254 (1970), this Court recognized the importance of cross-examination in such a situation, at 269:

> "[W]ritten submissions do not provide the flexibility of oral presentations; they do not permit . . .

[34] App. G, 73a-74a.

[35] K. C. Davis, 2 *Administrative Law Treatise* (1958), § 15.14, p. 432.

> [the party] to mold his argument to the issues the decision maker appears to regard as important . . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

Nevertheless, in the face of strong allegations of inadequate presentation of facts by the Authority and serious conflict of opinion before that body, the court of appeals sustained the denial of an opportunity for cross-examination.

The court held that cross-examination was unnecessary because the Association had failed to demonstrate the inadequacy of written questions.[36] It thereby imposed a negative burden on the Association which is virtually impossible to bear. Yet, the right to cross-examination is inherent in trial-type hearings. This case is not one where a preliminary showing is mandated, *e.g., F.P.C. v. Texaco, Inc.*, 377 U.S. 33, 39-41 (1964), nor is it comparable to the narrowly limited holdings, based on special fact situations, in the cases cited by the court below.[37] To make the Association's right of cross-examination contingent upon a negative demonstration effectively nullifies that fundamental right.

The court of appeals departed from established principle without justification. It cited no applicable decisions. Instead, it sought support from a number

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[36] App. G, p. 74a and n. 11 on that page; compare the concurring opinion, p. 76a.

[37] App. G, p. 72a-74a.

of opinions which have little or no relevancy to this particularized ratemaking case.[38]

b. This Court has established a general principle of constitutional law to be followed in administrative determinations of reasonable rates.

In order to prevent unconstitutional takings of property under the Fifth and Fourteenth Amendments of the Constitution, this Court has established that a determination of reasonable rates must involve two basic steps: (1) the adjustment of the general revenue level to cover reasonable operating costs, including financing costs, and the debt service requirement of bond covenants (in the case of publicly-owned utilities); and (2) the adjustment of rate schedules conforming to that level so as to eliminate undue discrimination and unfairness from their details. *F.P.C. v. Natural Gas Pipeline Co., supra,* 315 U.S. at 584.[39] These two steps are different in character but complementary of one another. They embrace the ratemaking standards of the Authority Act.

On remand, the Authority attempted the first step and failed; it did not attempt the second. The reports of its experts show, beyond contradiction, that the general level of electric revenues yielded by the increased rates exceeds by a substantial margin the

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[38] In addition to its misapplication of *Florida East Coast*, the court cited cases concerning areas such as fire code rules, hospital disciplinary procedures, commercial radio broadcasting-area rules and others of equal irrelevance to a proper determination of procedural requirements in a public utility ratemaking context. App. G, pp. 73a-74a.

[39] Because due process applies equally to the customers of publicly-owned and privately-owned utilities, this ratemaking procedure is equally applicable to all utilities, regardless of ownership. *Cf. Springfield Gas and Elec. Co. v. Springfield, supra,* 257 U.S. at 70.

operating costs allocable to the Authority's electric operations, including a debt service coverage far in excess of the bond covenant requirement. In the absence of cross-examination and rebuttal, the known excesses are minimums; the full extent of the excesses are unknown. Further, the Authority offered no proof that within a proper general revenue level its electric rate schedules are fair and devoid of undue discrimination. Instead, by refusing to meet its burden of proof, the Authority withheld relevant data from the ratepaying public.

The court below ignored the two-step ratemaking principle decreed by this Court and let stand the initial decision of the court of appeals to the effect that 30 V.I.C. § 105(a)(12) does not impose a duty on the Authority to make "rate studies as such." Whatever the meaning of the ambiguous phrase "rate studies as such," the court obviously did not intend to hold that the constitutional principle for determining reasonable rates established by this Court, and reflected in 30 V.I.C. § 105(a)(12), does not apply here. Yet, that is the effect of the refusal of the court below to address itself to that aspect of this case.

II. The Decision Below Wrongly Holds That It Is Within the Authority's Discretion Whether to Comply with Its Statutory Mandates; It Violates Procedural and Property Rights Protected by the Fourteenth Amendment.

1. The decision below disregards and negates the public interest mandate of 30 V.I.C. §§ 101(f) and 105(a) and the ratemaking standard and hearing procedure prescribed by 30 V.I.C. § 105(a)(12); it sanctions the denial of constitutional rights of electric ratepayers.

In practical terms the decision permits the Authority, in its discretion, to employ *any* future cost increase as justification for increasing its electric rates, regard-

less of whether the resulting revenues substantially exceed those needed to cover reasonable electric operating costs and maintain the required debt service coverage, and regardless of whether the increased electric rate schedules are unfair and unduly discriminatory; in short, regardless of whether the increased rates are "reasonable." The decision renders the public interest mandate of 30 V.I.C. §§ 101(f) and 105(a) and the ratemaking standard of 30 V.I.C. § 105(a)(12) nugatory and sanctions ratemaking by administrative fiat.[40] It leaves electric ratepayers in the Virgin Islands vulnerable to arbitrary rate action by the Authority. The decision also denies them protection against unreasonable rates assured by the Fourteenth Amendment of the Constitution.

Moreover, the decision permits the Authority to adopt hearing procedures, in its discretion, regardless of whether they afford its ratepayers any of the traditional safeguards of trial-type ratemaking hearings and procedural due process. It thereby reduces the ratemaking hearings mandated by 30 V.I.C. § 105(a)(12) and the procedural requirements of the Fourteenth Amendment to nullities.

The Authority abandoned its ratemaking function to the consulting engineering firm of Jackson & Moreland by rubber-stamping its recommended rate increases, after hearing which were not "meaningful" by the court of appeals' own definition, in disregard of contradictory evidence from its own consultants as to the need for the increased electric income level, and

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[40] See generally, *e.g.*, *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *In re Permian Basin Area Rates Cases*, *supra*, 390 U.S. at 791.

by withholding proof of the appropriate income level and the propriety of the discrimination introduced by the Authority into the increased electric rate schedules. Additionally, the Authority's hearing procedure failed to include adequate notice of the factual bases for the rate action, advance notice of the unique use of written questions, swearing of the Authority's experts, and testing of their reports by cross-examination and rebuttal.[41]

Yet, the decision below strained to condone the Authority's hearing procedure. Aside from the misapplication and misconception of the decisions of this Court already noted, the court below: (1) made assumptions in favor of the Authority which are unsupported by the record and are contrary to fact or law;[42] (2) disregarded the Authority's failure to meet its burden of

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[41] In the Association's only opportunity for cross-examination of an Authority witness, before the district court, "he testified in essence that the Authority could not determine whether the 'overall rate structure [was] fair' for the reason that a proper rate study had not been made." App. C, p. 42a.

[42] *E.g.*, the assumptions that the new reports commissioned by the Authority in the summer of 1972 were "[t]o comply with this Court's mandate" (App. G, p. 67a); that, in complaining that notice of the hearings on remand was too short, the Association "asks us to ignore . . . the district court's injunction which had been stayed for ten months" (*id.*, p. 70a); that "no reason appears to us that the point there raised [in the Association's offer of proof] could not have been formulated in written questions" (*id.*, p. 74a); that, in essence, the Association's contention that the Authority did not have adequate information available for a determination of reasonable electric rates "is that the Authority does not know how to allocate various expenses between water and power distribution [sic] and does not know how much it costs it to supply power to the various types of power users" (*id.*, p. 75a); and that "the three engineering studies introduced at the hearings seem to provide just this type of information" *(id.)*.

proof as to the reasonableness of its increased electric rate schedules;[43] (3) raised to the level of persuasiveness the Authority's misrepresentation that it cannot obtain financing because of the pendency of this litigation;[44] (4) excused the Authority's otherwise fatal procedural shortcomings because of the Association's three-week delay in hiring a rate expert and the alleged delay of the Association's counsel in requesting an "adjournment" until after counsel had learned that the Authority had misled it into believing that the hearings would be "evidentiary";[45] (5) misrepresented the Association's continuing objection to the Authority's hearing procedure as dereliction by the Association in failing to comply with the procedure complained about;[46] (6) warped the Association's claim of biased decisional officers into a claim of intimidation or denial "of privileges available to other participants;"[47] (7) gratuituously held that the Authority's September 1972 resolution reaffirming its increased rates does not indicate reliance on data outside the record when the language of the resolution cannot reasonably be otherwise construed;[48] (8) con-

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[43] *Commonwealth of Puerto Rico v. F.M.C., supra.*

[44] App. G, p. 71a; compare App. C, p. 36a. The Authority failed to tell the court that it had obtained $15,000,000 last year by the sale of bond anticipation notes, and in any event that *Baldwin-Lima-Hamilton Corporation v. Virgin Islands Water & Power Authority,* Civil No. 544-1971, is still pending in the District Court of the Virgin Islands. Very recently, the Authority refinanced last year's note issue and financed a new capital improvement, totaling $21,000,000.

[45] App. G, pp. 70a-71a.

[46] App. G, p. 74a.

[47] App. G, pp. 74a-75a; compare App. G, p. 78a, n. 3.

[48] App. E, pp. 61a-62a; App. G, p. 75a.

structed non-existent substantive issues;[49] (9) disregarded the Association's complaints of lack of adequate notice of the factual bases for the rate action, lack of reasoned findings in support thereof, and lack of opportunity for argument before the Authority's Governing Board in light of the Board's prior approvals of the increased rate schedules; and (10) treated cavalierly the issue of procedural due process.[50]

2. The decision below frustrates judicial review of, and relief from, the Authority's unlawful and unconstitutional rate actions.

Having approved a meaningless hearing procedure, the decision renders judicial review of the Authority's rate actions meaningless. This is evidenced by the way in which the Authority's hearings on remand frustrated judicial review below. The decision thereby frustrates judicial relief for the Authority's ratepayers from the Authority's illegal and unconstitutional rate actions.

While there are several reasons for the court of appeals' misconceptions about this case, the most obvious ones are the Authority's refusal to bear its burden of proof and to permit cross-examination and rebuttal; lack of adequate findings by the Authority is another.[51] If, however, there had at least been an opportunity, through cross-examination and rebuttal, to dispel the obfuscation and confirm that the increased level of electric income was far in excess of that needed to cover reasonable operating costs and meet the debt service requirement, and that the increased rate sched-

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[49] App. G, pp. 75a-76a.

[50] App. G, 69a-70a.

[51] *In re Permian Basin Area Rates Cases, supra*, 390 U.S. at 792.

ules reflect undue discrimination, the court below would have had to find the increased rates illegal.

The Authority, in short, manipulated its hearings to defeat the public purposes it was created to serve, by withholding from the public data essential to a determination of reasonable rates, and by substituting color of necessity for proof of necessity while, at the same time, preventing the coloration from being shown to be illusory; it thereby also manipulated the outcome of judicial review by the court below.

The Authority's hearing procedure and rate action were patently arbitrary, and contrary to territorial law and the Fourteenth Amendment. Its substitution of government by men for government by law was wrongfully condoned by the decision below. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 136 (1951); *e.g., State Highway Commission of Missouri* v. *Volpe,* 41 U.S. L.W. 2539 (8th Cir., Apr. 2, 1973); *American Federation of Government Employees* v. *Phillips,* 41 U.S. L.W 2543 (D.D.C., Apr. 11, 1973).

CONCLUSION

We respectfully urge that the decision below, one of first impression from the Virgin Islands, and one which is violative of the law of the Territory and the Fourteenth Amendment of the Constitution and will profoundly confuse the law of administrative ratemaking procedure at all levels of government, including ratemaking by federal agencies subject to the Administrative Procedure Act, threatens the ratepayers of publicly-owned utilities and publicly regulated private utilities, generally, with deprivation of their constitutional procedural and property rights,

and encourages erosion of our constitutional government of laws. It should be reviewed and reversed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-486

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.), INC.,
a corporation, *Petitioner*

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX

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APPENDIX

APPENDIX A

The Statute Involved

The Virgin Islands Water & Power Authority Act (Title 30, Virgin Islands Code, Section 101, *et seq.*) is set forth below in full. The relevant provisions thereof are Sections 101, 103, 105(a) and 105(a)(12).

Chapter 5. Virgin Islands Water and Power Systems

Subchapter I. Declaration of Findings and Policy and Definitions

SECTION ANALYSIS

101. Declarations of findings and policy.
102. Definitions.

Subchapter II. Virgin Islands Water and Power Authority

103. Creation of Virgin Islands Water and Power Authority.
104. Governing Board and other personnel of Authority.
105. Powers of Authority.

Subchapter III. Bonds of Authority

106. Authorization of issuance; security, tax exemption; terms and conditions; etc.
107. Powers of Authority with respect to bonds.
108. Right to receivership upon default.
109. Remedies of bondholders.
110. Bonds of Authority legal investments for public or private funds.
111. Exemption of Authority from judicial process and taxes.

Subchapter IV. Assistance of Government of the Virgin Islands

112. Financial assistance; guarantees and purchases of bonds of Authority; loans and grants.
113. Authorization of issuance of bonds of the Government of the Virgin Islands.
114. Other assistance of Government of the Virgin Islands.
115. Moneys and accounts of Authority.

116. Competitive bidding.
117. Contributions to Employees Retirement System and Government Insurance Fund; Unemployment Compensation and Social Security Coverage.
118. Reports.
119. Agreements of the Government of the Virgin Islands.
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121. Lack of jurisdiction of other agencies.
122. Inconsistent provisions of other Acts superseded.
123. Separability of provisions.

Subchapter I. Declaration of Findings and Policy and Definitions

§ 101. Declarations of findings and policy

(a) An adequate supply of water and electric power is essential to the public welfare and the economic health of the Virgin Islands.

(b) Acute, severe and chronic water and electric power supply problems afflict the Virgin Islands.

(c) The inadequacy of existing water and electric power systems in the Virgin Islands constitutes a menace to the health and safety of its people and is inimical to its economic growth.

(d) The development, acquisition, construction, improvement, reconstruction, enlargement, extension, operation, repair, maintenance and use of water and electric power systems in the Virgin Islands is necessary to assure adequate water and electric power supplies and will protect the public health and safety and promote the public interest by economic development of the Virgin Islands.

(e) The powers conferred by this chapter are for public uses and purposes and are proper governmental functions for which public money may be expended, private property may be acquired, by eminent domain or otherwise, and

bonds or other obligations may be issued pursuant to section 8(b) of the Revised Organic Act of the Virgin Islands, as amended, or any other such authority as may hereafter be conferred by Federal law.

(f) The provisions enacted by this chapter are hereby declared to be necessary in the public interest, and the facilities herein authorized are declared to be public improvements and public undertakings.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378; amended Dec. 3, 1968, No. 2366, § 1a, Sess. L. 1968, Pt. II, p. 372.

§ 102. Definitions

(a) The term "Authority" shall mean the Virgin Islands Water and Power Authority created by this chapter.

(b) The term "Board" shall mean the Governing Board of the Authority.

(c) The term "facility" shall mean any one or a combination of two or more of the following for supplying water and electric power in the Virgin Islands, to wit: water and/or power supply and distribution systems, including distillation plants, plants for generating electricity by any means, stations, distribution lines, reservoirs, dams, canals, tunnels, conduits, wells, intakes, mains, laterals, standpipes, hydrants, meters, valves and other structures and equipment, and any other words, together with all parts thereof and appurtenances thereto and lands, rights in lands, and rights and privileges in connection therewith, which the Authority shall dee mto be necessary, proper, incidental or convenient in connection with its activities, and which are customarily used and employed in the production, collection, distillation, utilization, transmission, distribution, sale, exchange, rendering, or other disposition of water, electric power, electric equipment, supplies, services or other activities in which the Authority shall engage or desire to engage pursuant to its purposes.

(d) The term "water and electric power systems" shall mean all the facilities, as herein defined, for developing and supplying water and electric power.

(e) The term "water system" shall mean that part of the facilities, as herein defined, which the Authority shall deem to be necessary, proper, incidental, or convenient in connection with the development and supply of water, together with that part of the facilities for joint use in connection with the development and supply of water and electric power which the Authority shall deem to be fairly allocable to its water system.

(f) The term "electric power system" shall mean that part of the facilities, as herein defined, which the Authority shall deem to be necessary, proper, incidental or convenient in connection with the development and supply of electric power, together with that part of the facilities for joint use in connection with the development and supply of water and electric power which the Authority shall deem to be fairly allocable to its electric power system.

(g) The term "Virgin Islands Water and Power Systems" shall mean the water and power systems developed or acquired by the Authority under this chapter.

(h) The term "Electric Power and Water Distillation Systems of the Virgin Islands Corporation" shall mean the water supply and distillation works, electric generating works, distribution works and all other facilities, and other property, rights, franchises, contract, leases, records and accounts receivable, properly attributable to the water and power operations of said corporation.

(i) The term "bonds" shall mean the bonds, temporary bonds, refunding bonds, debentures, notes, interim bonds, receipts, certificates, or other evidences of indebtedness or obligations which are authorized to be issued by this chapter.

(j) The term "holder of bonds" or "bondholders" or any similar term shall mean any person who shall be the bearer of any outstanding bond or bonds registered to bearer, or not registered, or any registered owner of any outstanding bond or bonds which at the time shall be registered other than to bearer.

(k) The term "Federal agency" shall mean the United States of America, the President or any department thereof, or any corporation, agency or instrumentality heretofore or hereafter created, designated, or established by the United States of America.

(l) Words importing the singular number shall include the plural number and vice versa, and words importing persons shall include firms, partnerships of all kinds and corporations.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

Subchapter II. Virgin Islands Water and Power Authority

§ 103. Creation of Virgin Islands Water and Power Authority.

(a) The Governor of the Virgin Islands, the Commissioner of Public Works for the Virgin Islands, the Commissioner of Commerce for the Virgin Islands, the Director of the Budget and five other persons to be appointed by the Governor with the advice and consent of the Legislature, are hereby created a body corporate and politic constituting a public corporation and autonomous governmental instrumentality of the Government of the Virgin Islands, by the name of the "Virgin Islands Water and Power Authority". Of the appointed members, two must be residents of St. Thomas, and two must be residents of St. Croix, and one must be a resident of St. John, and none may be an employee of the Government of the Virgin Islands or of the Government of the United States. Appointed members

shall be appointed for terms of three years, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. Each appointed member shall serve until the appointment and qualification of his successor. Governmental members of the Authority shall be entitled to no compensation for their service as members. Nongovernmental members shall be entitled to compensation at the rate of $20.00 a day or fraction thereof spent in the work of the Authority. All members shall be entitled to reimbursement for, or per diem in lieu of, necessary travel expenses.

(b) The Authority hereby created is and shall be a governmental instrumentality subject, as provided for herein, to the control of the aforenamed officers of the Government of the Virgin Islands, acting in their capacity as members and Governing Board thereof, but it is a corporation having legal existence and personality separate and apart from the Government and the officers controlling it. Subject to section 112(a) of this title, the debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, facilities, and property of the Authority shall be deemed to be those of said Authority and not to be those of the Government of the Virgin Islands, or any office, bureau, department, agency, commission, municipality, branch, agent, officer or employee thereof.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378; amended Dec. 3, 1968, No. 2366, § 1b, Sess. L. 1968, Pt. II, p. 372.

§ 104. Governing Board and other personnel of Authority

(a) The powers of the Authority shall be exercised by a Governing Board consisting of the members of the Authority acting as a board. The Governor shall be Chairman of the Board and the Commissioner of Public Works shall be Vice-Chairman. Within one hundred and twenty (120) days after this chapter becomes effective, the Board shall

meet and organize and, as soon as practicable, shall appoint an Executive Director of the Authority who shall be authorized to attend all meetings of the Board but shall not be entitled to vote.

(b) Five members of the Board shall constitute a quorum for the purpose of organizing Authority and conducting the business thereof and for all other purposes, and all action shall be taken by a vote of the majority.

(c) The Board may appoint an Executive Director of the Authority and such officers, agents, or employees, permanent or temporary, and by contract or otherwise may employ such consulting engineers, superintendents, managers, fiscal, legal and other technical experts, as it may deem necessary, and shall determine their qualifications, duties, tenure and compensation without regard to chapter 25 of Title 3. The bylaws of the Authority may provide for the delegation to its Executive Director or its other officers, agents or employees of such of the powers and duties of the Authority as the Board may deem proper.

(d) The Executive Director shall be appointed by the Board exclusively upon the basis of merit as determined by technical training, skill, experience, and other qualifications best suited to carrying out the purposes of the Authority. The Executive Director shall be removable by the Board but only for cause and after notice and an opportunity to be heard.

(e) All property, personnel, records, contracts, leases, rights, franchises and unexpended balances of appropriations and funds of the Commissioner of Public Works or the Department of Public Works, as the case may be, by virtue of the provisions of chapter 3 of this title, relating to Water Supply, are hereby transferred to the Authority, effective at such time as may be determined by statute; provided, That any personnel so transferred who are found to be in excess of the personnel required for the efficient administration of the functions of the Authority, shall be

retransferred under existing law to other positions in the Government of the Virgin Islands. The Governor shall accompany any future proposal for transfer of the water distribution system to the Authority with a study and recommendations as to the terms for such transfer which will to the maximum extent protect the interest of consumers and further the public interest.

(f) The transfer to the Authority of all personnel of the Virgin Islands Corporation employed in connection with its water and power supply (including water distillation) and distribution functions is hereby authorized in the event that the Authority shall acquire, in accordance with section 105(a)(6) of this title, the Electric Power and Water Distillation Systems of the Virgin Islands Corporation; Provided, That any personnel so transferred who are found to be in excess of the personnel required for the efficient administration of the functions of the Authority shall be retransferred to other positions in the Government of the Virgin Islands.

(g) Any employee of the Government of the Virgin Islands or of the Virgin Islands Corporation transferred to and retained by the Authority pursuant to subsections (e) and (f) of this section shall be credited by the Authority with the amount of accumulated and current accrued annual leave to which he is entitled under local or federal law, as the case may be, and for which leave such employee has not received lump-sum payment.

(h) In the establishment of sick leave and other benefits for officers and employees of the Authority, the Board shall insofar as practicable and consistent with sound fiscal management take into account accumulation of such sick leave or other benefits by employees transferred pursuant to the provisions of subsections (e) and (f) of this section, provided, that any such employee who shall have accumulated sick leave in excess of 240 hours, shall be credited by the Authority with 240 hours of sick leave.

(i) No employee transferred pursuant to subsections (e) and (f) of this section shall be reduced in pay.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378; amended Dec. 3, 1968, No. 2366, § 1c, Sess. L. 1968, Pt. II, p. 373.

§ 105. Powers of Authority

(a)[1] The Authority is created for the purpose of developing and utilizing and aiding in the development and utilization of adequate water and electric power systems for the people of the Virgin Islands, and any other service or facilities incidental or appropriate thereto, and making the benefits thereof available to the inhabitants of the Virgin Islands in the widest economic manner consistent with sound fiscal management, and by this means to promote the general welfare and increase commerce and prosperity; the Authority is granted and shall have and may exercise all rights and power necessary or desirable for carrying out said purposes, including, but without limiting the generality of the foregoing, the following:

(1) to have perpetual existence as a corporation;

(2) to adopt, alter, and use a corporate seal which shall be judicially noticed;

(3) to make, and from time to time modify, and repeal, bylaws, rules and regulations, not inconsistent with this chapter, providing for the internal organization and management of the Authority, for the administration of its affairs and operations, and for carrying into effect the powers and purposes of the Authority;

(4) to sue and be sued in its corporate name;

(5) to make contracts and to execute all instruments necessary or convenient in the exercise of any of its powers;

(6) to acquire property, real, personal, or mixed, tangible or intangible, or any interest therein deemed by it to

[1] So in original. There are no other lettered subsections.

be necessary or desirable for carrying out the purposes of the Authority (including its own securities) by any lawful means (including, but without limitation, the exercise of the power of eminent domain in accordance with chapter 19 of Title 28), and to own, hold, develop, improve, redevelop, enlarge, extend, repair, maintain, use and operate said property;

(7) to sell, lease, exchange, transfer, assign, mortgage, pledge, or otherwise dispose of, or encumber, any real or personal property, or any interest or estate in such; Provided, That no provisions of law with respect to the acquisition, operation or disposition of property by other public agencies shall be applicable to the Authority unless the Legislature shall specifically so provide; And provided further, That except for a sale resulting from mortgage foreclosure, in no case shall the Authority have the power to sell any property unless the same, in the judgment of the Governing Board, is no longer required for carrying out the business of the Authority or for effectuating the purposes of this chapter;

(8) to borrow money, make and issue bonds of the Authority for any of its corporate purposes, and give security therefor as provided for in subchapter III of this chapter;

(9) to make and issue bonds for the purpose of funding, refunding, purchasing, paying, or discharging any of the outstanding bonds or obligations issued or assumed by it;

(10) to accept grants or loans from, and enter into contracts, leases, agreements, or other transactions with, any Federal agency, the Government of the Virgin Islands, or political subdivisions thereof, and to expend the proceeds of any such grants or loans for any of its corporate purposes;

(11) to invest funds in United States obligations or other securities approved for investment for the Government of the Virgin Islands;

(12) to determine, fix, alter, charge, and collect reasonable rates, fees, and other charges for the use of the facilities of the Authority, or for the services, water, electric power, or other commodities rendered or furnished by it, which shall be at least sufficient, together with all other available moneys, revenues, income and receipts of the Authority from all sources, for the payment of the expenses of the Authority incurred in connection with the repair, maintenance, use and operation of its facilities and properties, for the payment of the principal of and the interest on its bonds, and for fulfilling the terms and provisions of such covenants as may be made with, or for the benefit of, the purchasers or holders of any bonds of the Authority; Provided, That in fixing rates, fees, and other charges for water and electric power, the Authority shall have in view the encouragement of the widest economically possible use of water and electric power consistent with sound fiscal management; and in this connection it is the intention of the Legislature that in fixing such rates, fees and other charges the Authority shall take into account the respective expenses, as hereinbefore enumerated in this subparagraph, for the water and electric power systems; provided, further, That initially, the Authority shall adopt the existing rates, fees and other charges for water and power, and that, thereafter, before changes in such general rate structure for water or electric power are made, or, in cases where the Board shall decide to make such changes and deems the immediate effectiveness thereof to be necessary, then within a reasonable time after such changes are made, a public hearing shall be held with respect thereto before the Board, or before such hearing officer or officers as the Board may designate to give interested persons an opportunity to advise the Board of their views and of evidence in support thereof, and upon such hearing, the Board, pursuant to the powers, duties, and obligations vested in it by this chapter, may alter, suspend, or revoke such changes;

(13) to have complete control and supervision of facilities and properties constructed or acquired by it, including

the power to determine the character of and necessity for all its expenditures and the manner in which they shall be incurred, allowed and paid, and such determinations shall be final and conclusive for all purposes;

(14) to prepare, or cause to be prepared, plans, designs, specifications and estimates of costs for the acquisition, construction, reconstruction, extension, improvement, enlargement, or repair of any facility, and from time to time to modify such plans, designs, specifications and estimates;

(15) to acquire in accordance with paragraph (6) of this subsection, produce, impound, develop, treat, hold, use, transmit, distribute, supply, exchange, sell, rent, and otherwise dispose of water, electric power, equipment, and/or such other things, supplies and services as the Authority shall deem necessary, proper, incidental, or desirable in connection with its activities under this chapter;

(16) to construct or reconstruct any facility, and any additions, improvements and extensions thereto by contract or contracts, and/or under, through, or by means of its officers, agents, and employees;

(17) to enter on any lands, property or structure after notifying the owners or holders thereof, or their representatives, for the purpose of making surveys, appraisals, soundings, borings, or examinations, and to enforce the power of such entry by appropriate proceedings in a court of competent jurisdiction if entry is denied or resisted; Provided, That the Authority shall restore any such land, property or structure, insofar as possible to their condition or state at the time of entry;

(18) to construct or place any facilities and to operate, maintain, and extend the same, across, in, over, under, through, or along any street, public highway, or any lands which may now or hereafter be the property of the Government of the Virgin Islands without obtaining any franchise or other permit therefor; Provided, That the Authority

shall obtain the consent of the Commissioner of Public Works with respect to construction affecting public lands and highways; And, provided, That the Authority shall restore any such street, highway, or lands, insofar as possible to their condition or state at the beginning of the work and shall not use the same in a manner unnecessarily to impair their usefulness;

(19) subject to the provisions of section 104(e) of this title, to perform all of the functions, consistent with this chapter, heretofore vested in the Governor of the Virgin Islands and the Commissioner of Public Works by chapter 3 of this title;

(20) to do all acts or things necessary or desirable to carry out the powers granted to it by this chapter or by any other Act of the Legislature of the Virgin Islands;

(21) to participate in the programs of any Federal agencies in the fields of water and electric power supply (including water distillation) and distribution and, consistent with this chapter, to do any and all things necessary to secure participation in such programs and the cooperation of such agencies in achieving the policies and purposes of this chapter.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378; amended Dec. 3, 1968, No. 2366, § 1d, Sess. L. 1968, Pt. II, p. 373.

Subchapter III. Bonds of Authority

§ 106. Authorization of issuance; security, tax exemption; terms and conditions; etc.

(a) By authority of the Government of the Virgin Islands under section 8(b)(i) of the Revised Organic Act of the Virgin Islands, as amended, which is hereby granted, the Authority may issue and sell bonds from time to time and have outstanding at any one time, exclusive of bonds issued solely for the purpose of exchanging the same in return for the cancellation of bonds either issued by the

Authority or assumed by it, bonds not in excess of twenty-five million (25,000,000) dollars, in aggregate principal amount, in addition to all sums that the Legislature of the Virgin Islands has authorized or may authorize separately for particular purposes; Provided, however, That refunding bonds of the Authority issued solely for the purpose of applying the proceeds thereof to the payment for, or purchase of, bonds issued by the Authority or assumed by it, shall not be included in computing any such limitation until six (6) months after their sale.

(b) Payment of the bonds of the Authority may be secured by a pledge or lien on all or any part of its properties, contracts, gross or net rates, fees, revenues, other income or bond proceeds to which the rights of the Authority then exist or may thereafter come into existence or by pledge of or lien on any loan, grant, or contribution, or parts thereof, from any Federal agency, the Government of the Virgin Islands (except as provided for in section 112(b) of this chapter) or any other source. It is the intention hereof that any pledge of revenues or other monies, or of a revenue-producing contract or contracts made by the Authority shall be valid and binding from the time when the pledge is made; that the revenues, or other monies or proceeds of any contract or contracts so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act; and that the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contracts or otherwise against the Authority irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge is created need be recorded.

(c) In accordance with section 8(b) of the Revised Organic Act of the Virgin Islands, as amended, the bonds of the Authority shall be exempt as to principal and interest from taxation by the Government of the United States, or

by the Government of the Virgin Islands, or by any state, territory, or possession, or by any political subdivision of any state, territory or possession, or by the District of Columbia.

(d) Bonds of the Authority shall be authorized by resolution or resolutions of the Board, and shall comply with all pertinent provisions of the Revised Organic Act of the Virgin Islands, as amended, or such other provisions of applicable Federal law as may be in effect at the time. Except as otherwise provided for by said Act or other Federal law, bonds of the Authority may be issued in one or more series and shall bear such date or dates, mature in such amounts and at such time or times, bear interest at such rate or rates, payable semiannually, be in such denomination or denominations, be in such form, either coupon or registered, carry such conversion or registration privileges, have such rank or priority, be executed by such members or officers in such manner, be payable in such medium of payment, at such place or places, may be declared or become due at such time before the maturity date thereof, may be authenticated in such manner and upon compliance with such conditions, and may contain such other terms and covenants as such resolutions or its trust indenture may provide.

(e) The bonds shall be sold in such manner as permitted by the Revised Organic Act of the Virgin Islands, as amended, or other applicable Federal law, at such price as the Authority may determine.

(f) In case any of the members or officers of the Authority whose signatures appear on any bonds or coupons shall cease to be such members or officers before the delivery of such bonds, such signatures shall, nevertheless, be valid and sufficient for all purposes, the same as if such members or officers had remained in office until such delivery. Any provision of any law to the contrary notwithstanding, any bonds issued by the Authority pursuant to this chapter

shall be negotiable for all purposes, subject to the provisions of bonds for registration.

(g) Neither the members of the Authority nor any person executing the bonds shall be liable personally on the bonds or be subject to any liability by reason of the issuance thereof.

(h) In any suit, action or proceeding involving the validity or enforceability of any bond of the Authority or the security therefor, any such bond reciting in substance that it has been issued by the Authority to aid in financing a facility as defined in this chapter, shall be conclusively deemed to have been issued for such purpose, and the facility shall be conclusively deemed to have been undertaken, constructed or acquired in accordance with the provisions of this chapter.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378; amended Dec. 6, 1966, No. 1824, § 1, Sess. L. 1966, p. 535; April 17, 1967, No. 1906, § 1, Sess. L. 1967, p. 91; amended Dec. 3, 1968, No. 2366, § 1e, f, Sess. L. 1968, Pt. II, p. 373; Feb. 13, 1970, No. 2625, Sess. L. 1970, p. 14.

§ 107. Powers of Authority with respect to bonds

In any resolution or resolutions authorizing the issuance of bonds, the Authority may contract with the holders of the bonds to undertake and obligate itself of such commitments, as long as the bonds are outstanding and unpaid, as are deemed by the Board to be necessary and appropriate for the protection of the bondholders and the marketability of the bonds, and may specifically in addition to any other provisions—

(a) covenant as to the disposition of the entire gross or net revenues and present or future income of the Authority including the pledging of all or any part thereof to secure payment of the bonds and the interest thereon;

(b) covenant against making, permitting or suffering any pledge or other lien on all or any part of its receipts,

revenues or other income, or real or personal property, to which its right or title then exists or may thereafter come into existence; covenant with respect to limitations on any sale, lease or other disposition of the Virgin Islands Water and Power Systems or any part or parts thereof; and covenant as to what other or additional debts or obligations may be incurred by it;

(c) covenant as to the bonds then or thereafter to be issued as to the issuance of such bonds in escrow or otherwise, as to the use and disposition of the proceeds thereof, and as to the limitations on the issuance of additional bonds; covenant against extending the time for the payment of its bonds or interest thereon; and covenant for redemption of the bonds and provide for the terms and conditions thereof;

(d) covenant as to the rates, fees, rentals, and other charges to be fixed and collected, the amount to be raised each year or other period of time thereby, and as to the use and disposition to be made thereof;

(e) create or authorize the creation of special funds or reserves for moneys held for construction or operating costs, debt service, reserves, or other purposes; and covenant as to the use, disposition and investment of the moneys held in such funds;

(f) covenant as to the use, maintenance and replacement of any or all of its real or personal property, the amount and kind of insurance to be carried thereon and the use and disposition of insurance moneys;

(g) prescribe the procedure, if any, by which the terms of the bonds, resolution, or any other contract with the bondholders may be modified, the amount of bonds, the holders of which must consent thereto, and the manner in which such consent may be given;

(h) covenant as to and prescribe the events of default and terms and conditions upon which any or all of its bonds

shall become or may be declared due before maturity, and as to the terms and conditions upon which such declaration and its consequences may be waived;

(i) covenant as to the rights, liabilities, powers and duties arising upon the nonperformance by the Authority of any of its covenants, conditions, or obligations, including the right and remedies of bondholders which may be in addition to remedies specified in this chapter;

(j) vest in a trustee or trustees the right to enforce the payment of the bonds or any covenants securing or relating to the bonds and the right, in the event of a default by the Authority, to take possession of and use, operate and manage the Virgin Islands Water and Power Systems or any part or parts thereof or any funds connected therewith (except funds loaned or granted to the Authority by the Government of the Virgin Islands in accordance with section 112(b) of this title), and to collect the rates, fees, revenues, or other income arising therefrom and to dispose of such moneys in accordance with the agreement of the Authority with the holders of the bonds; provide for the powers and duties of such trustee or trustees which may be a national banking association or a bank or trust company organized under the laws of the United States or of the Virgin Islands or any state, and limit the liabilities thereof; and provide the terms and conditions upon which the holders of the bonds or any proportion of them may enforce any covenant or rights securing or relating to the bonds; and

(k) exercise all or any part or combination of the powers herein granted; make covenants and to do any and all such acts and things not inconsistent with this chapter as may be necessary and desirable in order to secure its bonds, or as may tend to make the bonds more marketable notwithstanding that such covenants, acts or things may not be enumerated herein.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 108. Right to receivership upon default

(a) The Authority is authorized to covenant for the right to receivership upon default as hereinafter set forth in subsections (b) to (f) of this section inclusive, or to limit such right by definition of default or otherwise, in its agreement with the bondholders.

(b) In the event that the Authority shall default in the payment of the principal of, or interest on, any of its bonds after the same shall become due, whether it be a default in the payment of the principal and interest or in the payment of interest only at maturity or upon call for redemption, and such default shall continue for a period of thirty (30) days, or in the event that the Authority or the Board, officers, agents, or employees thereof shall default on any agreement made with the holders of the bonds, any holder or holders of the bonds (subject to any contractual limitation as to a specific percentage of such holders), or trustee therefor, shall have the right to apply in an appropriate judicial proceedings to any court of competent jurisdiction in the Virgin Islands for the appointment of a receiver of the facilities, the income or revenues of which are pledged to the payment of the bonds so in default, whether or not all the bonds have been declared due and payable and whether or not such holder, or trustee therefor, is seeking or has sought to enforce any other right or to exercise any remedy in connection with such bonds. Upon such application and showing the court may appoint, and if the application is made by the holders of twenty-five (25%) per centum in principal amount of such bonds then outstanding, or by any trustee for holders of bonds in such principal amount, shall appoint a receiver of such facilities.

(c) The receiver so appointed shall forthwith, directly or by his agents and attorneys, enter into and upon and take possession of such facilities and may exclude the Authority, its Board, Officers, agents, and employees and all persons claiming under them, wholly therefrom and shall have, hold,

use, operate, manage, and control the same, and, in the name of the Authority or otherwise, as the receiver may deem best, shall exercise all the rights and powers of the Authority with respect to such facilities as the Authority itself might do. Such receiver shall maintain, restore, insure, and keep insured, such facilities and from time to time shall make all repairs necessary or proper for the conservation of the facilities, shall establish, levy, maintain, and collect such rates, fees, and other charges in connection with such facilities as such receiver may deem necessary, proper and reasonable, consistent with the purposes of the receivership and the purposes of this chapter, and shall collect and receive all income and revenues and deposit the same in a separate account and apply the income and revenues so collected and received in such manner as the court shall direct.

(d) Whenever all that is due upon the bonds, and interests thereon, and under any of the terms of any covenants or agreements with bondholders shall have been paid or deposited as provided therein, and all defaults in consequence of which a receiver may be appointed shall have been cured and made good, the court may, in its discretion and after such notice and hearing as it deems reasonable and proper, direct the receiver to surrender possession of such facilities to the Authority, the same right of the holders of the bonds to obtain the appointment of a receiver to exist upon any subsequent default as hereinabove provided.

(e) Such receiver shall act, in the performance of the powers hereinabove conferred upon him, under the direction and supervision of the court and shall at all times be subject to the orders and decrees of the court and may be removed thereby. Nothing herein contained shall limit or restrict the jurisdiction of the court to enter such other and further orders and decrees as such court may deem necessary or appropriate for the exercise by the receiver of any functions specifically set forth in this chapter.

(f) Notwithstanding anything in this section to the contrary, such receiver shall have no power to sell, assign, mortgage, or otherwise dispose of any assets of whatever kind or character belonging to the Authority and useful for its activities, but the powers of any such receiver shall be limited to the operation and maintenance of the facilities of the Authority, and the collection and application of the income and revenues therefrom, and the court shall not have jurisdiction to enter any order or decree requiring or permitting said receiver to sell, mortgage, or otherwise dispose of any such assets.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 109. Remedies of bondholders

(a) Subject to any contractual limitations binding upon the holders of any issue of bonds, or trustees therefor, including but not limited to the restriction of the exercise of any remedy to a specified proportion or percentage of such holders, any holder of bonds, or trustee therefor, shall have the right and power, for the equal benefit and protection of all holders of bonds similarly situated—

(1) by mandamus or other suit, action, or proceeding at law or in equity to compel the Authority and its Board, officers, agents, or employees to perform and carry out its and their duties and obligations under this chapter and its and their covenants and agreements with bondholders;

(2) by action or suit in equity to require the Authority and the Board thereof to account as if they were the trustees of an express trust;

(3) by action or suit in equity to enjoin any acts or things which may be unlawful or in violation of the rights of the bondholders; and

(4) to bring suit upon the bonds.

(b) No remedy conferred by this chapter upon any holder of the bonds, or any trustee therefor, is intended to be exclusive of any other remedy, but each such remedy is cumu-

lative and in addition to every other remedy, and may be exercised without exhausting and without regard to any other remedy conferred by this chapter or by any other law. No waiver of any default or breach of duty or contract, whether by any holder of the bonds, or any trustee therefor, shall extend to or shall affect any subsequent default or breach of duty or contract or shall impair any rights or remedies thereon. No delay or omission of any bondholder or any trustee therefor to exercise any right or power accruing upon default shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence therein. Every substantive right and every remedy, conferred upon the holder of the bonds, may be enforced and exercised from time to time as often as may be deemed expedient. In case of any suit, action or proceeding to enforce any right or exercise any remedy shall be brought or taken and then discontinued or abandoned, or shall be determined adversely to the holder of the bonds, or any trustee therefor, then and in every such case the Authority and such holder, or such trustee, shall be restored to their former positions and rights and remedies as if no such suit, action, or proceeding had been brought or taken. —Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 110. Bonds of Authority legal investments for public or private funds

The bonds of the Authority shall be lawful investment, and may be accepted as security, for all fiduciary, trust and public funds, the investment or deposit of which shall be under the authority or control of the Government of the Virgin Islands or any officer or officers thereof.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 111. Exemption of Authority from judicial process and taxes

(a) All property including funds of the Authority shall be exempt from levy and sale by virtue of an execution, and

no execution or other judicial process shall issue against the same nor shall any judgment against the Authority be a charge or lien upon its property; Provided, however, That this subsection shall not apply to or limit the right of bondholders to pursue any remedies for the enforcement of any pledge or lien given by the Authority on its rates, fees, revenues, or other income or any other funds.

(b) The purpose for which the Authority is created and shall exercise its powers being public purposes, the property of the Authority, its income and its activities shall be exempt from all taxes and special assessments of the Virgin Islands or any political subdivision thereof. In lieu of taxes, the Authority may agree to make such payments to the Virgin Islands or any political subdivisions thereof as if finds consistent with the maintenance of the Virgin Islands Water and Power Systems, the obligations of the Authority and the achievement of the purposes of this chapter.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

Subchapter IV. Assistance of Government of the Virgin Islands

§ 112. Financial assistance; guarantees and purchases of bonds of Authority; loans and grants

(a) For the purpose of assisting the Authority with its financing, the Government of the Virgin Islands, to the extent permitted by the Revised Organic Act of the Virgin Islands, as amended, or any other applicable Federal law, may—

(1) guarantee payment of the bonds of the Authority, both as to principal and interest;

(2) employ its funds in the purchase of the bonds of the Authority, notwithstanding any provision of any law to the contrary.

(b) For the purpose of raising funds to be granted or loaned to the Authority to construct, improve, extend, bet-

ter, repair, reconstruct, acquire and equip any part of the Authority's water systems, the Government of the Virgin Islands may—

(1) borrow money, make and issue bonds or other evidence of indebtedness, and secure such bonds or other obligations by pledge of the Government's credit and taxing power, as provided for in section 113 of this title;

(2) make or issue bonds for the purpose of funding, refunding, purchasing, paying, or discharging any of the outstanding bonds or obligations issued, guaranteed or assumed by it in pursuance of this section.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 113. Authorization of issuance of bonds of the Government of the Virgin Islands

In pursuance of section 8(b)(ii) of the Revised Organic Act of the Virgin Islands, as amended, the issuance of general obligation bonds or other obligations by the Government of the Virgin Islands, not in excess of five million five hundred thousand dollars ($5,500,000) in aggregate principal amount of said bonds outstanding at any one time, is hereby authorized and approved, as the Governor may deem necessary and advisable, subject to the same qualifications upon said limitation as are set forth in section 106(a) of this title. To the extent consistent with section 8(b)(ii) of the Revised Organic Act of the Virgin Islands, as amended, or any other applicable Federal law, the provisions of subsections (c) through (h) of section 106 and of section 110 of this title shall apply equally to the bonds of the Government of the Virgin Islands and all powers thereby vested in the Authority, its Board, members, officers and other persons shall apply instead to the Governor of the Virgin Islands and his designee or designees, who shall be officers or employees of the Government of the Virgin Islands; Provided, however, That the bonds of the Government of the Virgin Islands shall be issued by a written declaration

or declarations of the Governor which shall provide for public or private sale of the bonds and for their redemption with or without premium, and shall contain such other provisions as may be deemed necessary or desirable for the protection of the bondholders and the security of the bonds. —Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378; amended Nov. 21, 1967, No. 2069, Sess. L. 1967, p. 519.

§ 114. Other assistance of Government of the Virgin Islands

(a) For the purpose of further aiding the Authority in developing and maintaining the Virgin Islands Water and Power Systems, the Government of the Virgin Islands or any political subdivision thereof, may at the request of the Authority and upon such terms, with or without consideration, as said Government or political subdivision shall determine—

(1) dedicate, sell, convey, or lease any of its interest in any property or grant easements, licenses or any rights or privileges therein to the Authority;

(2) cause services of the character which it is otherwise empowered to render to be furnished to the Authority.

(b) Any sale, conveyance, lease or agreement provided for a this section may be made without appraisal, public notices, advertisement or public bidding, notwithstanding any other laws to the contrary.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

Subchapter V. Other Purposes

§ 115. Moneys and accounts of Authority

(a) All moneys of the Authority shall be deposited in qualified depositories for funds of the Government of the Virgin Islands, but they shall be kept in separate accounts in the name of the Authority. The disbursements shall be

made by it pursuant to regulations and budgets approved by the Board. Notwithstanding the provisions of this subsection the Authority shall have power to contract with the holders of any of its bonds as to the custody, collection, investment and payment of any moneys of the Authority, or any moneys held in trust or otherwise for the payment of bonds or in any way to secure bonds, and deposits of such moneys may be secured in the same manner as moneys of the Authority.

(b) The Authority shall account to the Government of the Virgin Islands in accordance with applicable law for all funds which the Government may furnish to the Authority, by loan or grant. The Authority shall also account to any Federal agency, if and in the manner required, for any funds that it may have received from any such agency.

(c) The Authority shall establish an accounting system for the proper statistical control and record of all expenses and income belonging to or managed or controlled by the Authority. Subject to agreements with bondholders, said system shall segregate the accounts for water and power functions, make a reasonable allocation of costs that may be common to both functions, and insofar as advisable, otherwise segregate the accounts for different classes of operations, facilities, and activities of the Authority; Provided, That from time to time the Authority shall have its accounts and books, including its receipts, disbursements, contracts, leases, sinking funds, investments and any other matters which relate to its financial condition examined by an independent accountant who shall report thereon to the Board of the Authority and to the Legislature.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 116. Competitive bidding

All purchases and contracts for supplies for services, except for personal services, made by the Authority, including contracts for the construction of facilities of the Au-

thortiy, shall be made after advertisement for bids sufficiently in advance of opening bids for the Authority to secure appropriate notice and opportunity for competition; Provided, That where the expense estimated to be necessary in connection with the purchase or work does not exceed two thousand five hundred (2,500) dollars the same may be carried out without advertisement for bids. Advertisement for bids shall not be required, however, when—

(1) an emergency requires immediate delivery of the materials, supplies, equipment, or performance of the services; or

(2) repair parts, accessories, or supplemnetal equipment or services are required for supplies or services previously furnished or contracted for; or

(3) professional, financial (including financial printing) or other expert services or work are required and the Authority shall deem it best in the interest of good administration that contracts therefor be made without such advertisement; or

(4) Prices are noncompetitive because there is only one source of supply or because regulated under law; in such case the purchase of such materials, supplies, or equipment, or procurement of such services, may be made in the open market in the manner usual in commercial practice. In the comparison of bids and the making of awards, due consideration shall be given to such factors (in addition to whether the bidder has complied with the specifications) as the bidder's ability to perform construction work of the kind involved in the construction contract under consideration; the relative quality and adaptability of materials, supplies, equipment, or services; and the time of delivery or performance offered. The Authority may prescribe rules and regulations for the submission of bids.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 117. Contributions to Employees Retirement System and Government Insurance Fund; Unemployment Compensation and Social Security Coverage

(a) All officials and employees of the Authority shall be covered by and subject to the Employees Retirement System of the Virgin Islands and the Workmen['s] Compensation Act. The Authority shall contribute to the Retirement System of the Government of the Virgin Islands its share of the cost of the retirement of the officials and employees on the basis of semiannual billings as determined by the Division of Personnel, Government of the Virgin Islands, and the contribution of officials and employees for retirement shall be deducted from the salaries in the same manner as in the case of regular employees of the Government of the Virgin Islands and shall be paid semiannually to the Retirement Fund of the Government of the Virgin Islands. The Authority shall also contribute to the Government Insurance Fund, on the basis of annual billings as determined by the Commissioner of Finance for the benefit payments made from such fund on account of the Authority's employees. The annual billings shall also include a statement of the fair portion of the cost of the Government Insurance Fund, which shall be paid by the Authority into the Treasury of the Virgin Islands as miscellaneous receipts.

(b) For purposes of unemployment compensation, the Authority shall be deemed an employing unit as defined in section 302(j)(i) of Title 24, and the Authority shall make payments to the Unemployment Compensation Subfund and the Unemployment Compensation Administration Subfund in lieu of contributions in the same manner provided for the Government of the Virgin Islands by section 308(d) of Title 24.

(c) For purposes of Social Security coverage, the authority shall be deemed as an employing unit following signature of an agreement between the Government of the

Virgin Islands of the United States and the Social Security Administration; and the Authority shall make appropriate payroll deductions on the part of employees as well as on its own behalf as employer, and such deductions shall be paid to the Social Security Administration in accordance with existing procedures and in a manner identical with other covered agencies of the Government of the Virgin Islands.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378; amended March 1, 1965, No. 1317, Sess. L. 1965, Pt. I, p. 33.

§ 118. Reports

The Authority shall submit to the Legislature and to the Governor of the Virgin Islands, as soon as practicable after the close of each fiscal year of the Government of the Virgin Islands (1) a financial statement and complete report of the business of the Authority for the preceding fiscal year, and (2) a complete report on the status and progress of all of its facilities and activities since the creation of the Authority or the date of its last such report. The Authority shall also submit to the Legislature and to the Governor, at such other times as may be required, official reports of its business and activities under this chapter.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 119. Agreements of the Government of the Virgin Islands

The Government of the Virgin Islands does hereby pledge to, contract and agree with, any person, firm or corporation, or any Federal, Virgin Islands or state agency, subscribing to or acquiring bonds of the Authority or of the Government of the Virgin Islands issued for the purposes of this chapter, that it obligates itself not to limit or alter the rights or powers hereby vested in the Authority or the Government, as the case may be, until all such bonds at any time issued, together with the interest thereon, are fully met and discharged. The Government of the Virgin Islands

does further pledge to, contract and agree with, any Federal agency that in the event any such agency shall construct, extend, improve, or enlarge or contribute any funds for the construction, extension, improvement, or enlargement of, any facilities, the Government of the Virgin Islands will not alter or limit the rights or powers of the Authority in any manner which would be inconsistent with the continued maintenance and operation of such facilities or the extensions, improvement, or enlargement thereof, or which would be inconsistent with the due performance of any agreements between the Authority and any such Federal agency; and the Authority shall continue to have and may exercise all rights and powers herein granted so long as the same shall be necessary or desirable for the carrying out of the purposes of this chapter and the purpose of any Federal agency in constructing, extending, improving or enlarging, or contributing funds for the construction, extension, improvement or enlargement of, any facilities.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 120. Injunctions

An injunction shall not be granted to prevent the application of this chapter or any part thereof.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 121. Lack of jurisdiction of other agencies

No officer, board, commission, department or other agency or political subdivision of the Virgin Islands shall have jurisdiction over the Authority in the management and control of its properties and facilities, or any power over the regulation of rates, fees, rentals and other charges to be fixed, revised and collected by the Authority, or any power to require a certificate of convenience or necessity, license, consent, or other authorization in order that the Authority may acquire, lease, own and operate, construct, maintain, improve, extend or enlarge any facility.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 122. Inconsistent provisions of other Acts superseded

Insofar as the provisions of this chapter are inconsistent with the provisions of any other Act of the Legislature of the Virgin Islands, the provisions of this chapter shall be controlling and no law heretofore or hereafter passed governing the administration of the Government of the Virgin Islands or any parts, office, bureaus, departments, commissions, municipalities, branches, agents, officers or employees thereof shall be construed to apply to the Authority unless so specifically provided, but the affairs and business of the Authority shall be administered as provided herein. —Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

§ 123. Separability of provisions

If any provisions of this chapter or the application of such provisions to any person or circumstances shall be held invalid, the remainder of the chapter and the application of such provisions to persons or circumstances other than those as to which it shall have been held invalid shall not be affected thereby.—Added Aug. 13, 1964, No. 1248, Sess. L. 1964, p. 378.

APPENDIX B

VIRGIN ISLANDS WATER AND POWER AUTHORITY
VIRGIN ISLANDS OF THE UNITED STATES
ST. THOMAS, VIRGIN ISLANDS

RESOLUTION No. 89

[Adopted December 3, 1971]

WHEREAS, the Authority's power revenues have not kept pace with ever-increasing costs of operations, especially fuel costs; and

WHEREAS, the Authority must maintain a sound financial position in order to assure that it can undertake new borrowings to finance its future construction programs; and

WHEREAS, the Authority's financial consultants, Wainwright & Ramsey, on July 16, 1971 advised that an increase in the Authority's earnings is required if the Authority is to borrow the monies needed in March 1973; and

WHEREAS, the Authority appointed Jackson & Moreland, consulting engineers, to perform a study of the Authority's financial requirements for the purpose of assuring that an adequate level of earnings is maintained; and

WHEREAS, Jackson & Moreland, in a report dated October 31, 1971, a copy of which is attached,* has recommended to the Authority that its rates generally be increased; and

WHEREAS, pursuant to direction of the Board, the Executive Director of the Authority conducted public hearings under the Chairmanship of the Attorney General in order to permit interested persons an opportunity to advise the Board of their views with respect to the proposed rate increase; and

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* The attachments to this resolution are omitted here. They are included, however, in the record below.

WHEREAS, the Board has determined that the proposed rate increases are still required in order for the Authority to maintain a sound financial position;

NOW THEREFORE BE IT RESOLVED:

That the proposed rate schedules for Residential Service, Commercial and Small Power Service, Large Power Service, and Security Lights, copies of which are herewith attached, are to become effective December 1, 1971, for all meter readings on or after that date.

APPENDIX C

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Civil No. 499-1971

ACTION TO ENJOIN RATE INCREASE

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.) INC., *Plaintiff*

vs.

VIRGIN ISLANDS WATER & POWER AUTHORITY, *Defendant*

Opinion

This is an action filed by the Virgin Islands Hotel Association (plaintiff herein) to enjoin the Virgin Islands Water and Power Authority (herein "the Authority") from continuing to give effect to a change in the electric power rate structure on grounds that the Authority "acted in gross disregard of the V.I.W.A.P. Act and of procedural due process". Motions for a temporary restraining order and for a preliminary injunction were denied, following two separate hearings on grounds that plaintiff failed to show that immediate and irreparable harm would ensue to plaintiff by denial of such temporary injunctive relief.

By agreement of counsel, an expedited evidentiary hearing was held on the merits of the complaint and answer. Following that hearing, the Court met with counsel for both parties and principals of the Authority in an unsuccessful attempt to effect a settlement. The Court must now face the issues on the merits as to the legality or illegality of the rate increase.

The Authority argues that the increase in the power rate (approximately amounting to a 20% overall increase) was necessitated and compelled by the demands to meet the bond covenant to maintain a 1.5 ratio of revenues to

the debt service of the Authority's Series A Bonds. The Authority has outstanding nineteen million dollars in Series A Bonds. The bond covenant is in close danger of being violated (if not, in fact, has been violated) and it was urged by the Authority's consultants in municipal financing to take positive steps to issue a rate to assure maintenance of the bond convenant ratio. Furthermore, the Authority has authorized the issuance of Series B Bonds in the amount of ten million dollars to cover its obligation of five million dollars on a bond anticipation note due March 1, 1972 and another bond anticipation note of five million dollars due March 17, 1972. In addition, the Authority has outstanding contract commitments totalling eight million dollars. Before the Authority can sell the Series B Bonds (to raise the ten million dollars in March, 1972) and before it can borrow against one or more bond anticipation notes (to cover the eight million dollars contract obligations), the Authority must obtain a favorable opinion from bond counsel. The Authority maintains that so long as the Authority is involved in pending litigation, bond counsel cannot render a favorable opinion. While this was a factor which caused me to make extra diligent efforts to effect a settlement of this litigation, it cannot serve as a relevant and controlling factor in deciding the merits of plaintiff's complaint herein. Furthermore, judicial notice is taken of a pending litigation brought by Baldwin-Lima-Hamilton suing the Authority for an alleged debt of $275,000, *Baldwin-Lima-Hamilton* vs. *Virgin Islands Water & Power Authority*, Civil No. 544—1971, In the District Court of the Virgin Islands, Division of St. Thomas and St. John.

At the second full hearing on plaintiff's motion for a preliminary injunction, I stated my concern as to the standing of plaintiff to bring this suit, even though plaintiff's standing has never been challenged by the Authority. However, on reflection and on independent research, I am satisfied as to plaintiff's standing and the Court's juris-

diction herein. It is stated in *Data Processing Service* v. *Camp* 397 U.S. 150, 153, 90 S. Ct. 827, 25 L.Ed. 2d 184 (1970), that "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute . . ." The Court also went on to point out, at 154, that "he who is 'likely to be financially' injured, may be a reliable attorney general to litigate the issues of the public interest in the present case", citing *FCC* v. *Sanders Bros. Radio Station* 309 U.S. 470, 477 (1939). See also *Harding* v. *Kentucky Utilities Company* 390 U.S. 1 (1967), and *Abbot Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

It is also to be noted that in *Data Processing Service*, supra, at page 154, the Court stated, "there is no presumption against judicial review and in favor of administrative absolutism (Abbot Laboratories v. Gardner 387 U.S. 136 (1967)), unless that presumption is fairly discernible in the statutory scheme".

The Court is further persuaded on the issue of jurisdiction by 4 V.I.C., Sec. 74 that this complaint falls within the legislative permission therein granted.

I believe that plaintiff would also have standing under the concept enunciated in *Scenic Hudson Preservation Conference* vs. *Federal Power Commission*, 354 F2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941, 86 S. Ct. 1462, 16 L.Ed. 2d 540 (1966), as a "private attorney general". The Court there with regard to the issue of standing also pointed out, and with this I wholeheartedly concur, "our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken". Id. at 617. See also *Powelton Civic Home Own. Ass'n* v. *Department of Housing and Urban Development* 284 F. Supp. 809, 826 (E.D. Pa. 1968).

As noted before, both parties agree that the issue before the Court is the legality of the procedure by which the Authority increased its rates This is important because

this is an action to enjoin said rate increase and not an appeal from an agency decision. The difference is not merely one of semantics for unlike an appeal the scope of review for an injunction is broader than that when an appeal is involved. The interpretation of a statute is a matter of law and in a suit to enjoin agency action, a Court is free to substitute its own judgment for that of the administrator. In other words, "(i)t is the right to challenge, not the extent of the remedial power, which must first be considered: *Agnew* v. *Board of Governors,* 153 F2d 785 (D.C. Cir. 1946), rev'd on other grounds 329 U.S. 441, 67 S CA411, 91 L.Ed. 408 (1946).

The Authority asserts the legality of its procedure based on its interpretation of the statute which created it. It is noteworthy that the statute, 30 VIC 101 et seq., makes no provision for review of the Authority's actions, but this cannot mean that affected persons have no redress for illegal conduct on the Authority's part. In *Agnew* the Board attempted to assert an unchallengable right to its interpretation of a statute which was "administrative absolutism" of a sort the Court could not countenance.

The issue before the Court, therefore, is (1) whether the proper procedure was employed to arrive at a reasonable rate and (2) whether plaintiffs were afforded the hearing they alleged to be required by the Act establishing the Water and Power Authority. They contend in essence as to the latter that they were denied procedural due process. The Water and Power Authority Act, Title 30, Sec. 101 et. seq. provides in pertinent part (Sec. 105, Sub-sec. 12) that the Authority "shall determine, fix, alter, charge, and collect reasonable rates, fees. . . ."

Sub-section 12 further provides that initially the Authority

> "shall adopt the existing rates, fees and other charges for water and power, and that, thereafter, before

changes in such general structure for water or electrical power are made, or, in cases where the Board shall decide to make such charges and deem the immediate effectiveness thereof to be necessary, then within a reasonable time after such charges are made, a public hearing shall be held with respect thereto before the Board, or before such hearing officer or officers as the Board may designate to give interested persons an opportunity to advise the Board of their views and of evidence and support thereof, and upon such a hearing, the Board, pursuant to the powers, duties and obligations vested in it by this chapter, may alter, suspend or revoke such charges."

I begin with the proposition enunciated in *Price* v. *Philadelphia Parking Authority*, 221 A.2d 138, 145, 1966, that there is a

> 'recognition of the need to subject the activities of public authorities to judicial scrutiny. As public bodies, they exercise public powers and must act strictly within their legislative mandates. Moreover, they stand in the fiduciary relationship to the public which they are created to serve and their conduct must be guided by good faith and sound judgment. (Citations omitted). The mushrooming of and the frequent complaint that such bodies act in an arbitrary and capricious manner, dictate that a check rein be kept upon them. (Citations omitted). These considerations dictate that the independence of authorities from some of the usual restrictions on governmental activity not be extended so as to insulate them from judicial scrutiny through the medium of taxpayers' suits."[1]

[1] While the language cited deals with the standing of taxpayers to challenge the validity of the actions of these public authorities, the language cited is consonant with and relevant to the problem before the Court.

I, therefore, reject the suggestion on the part of the Authority made during the settlement negotiations that the action of the Authority is not subject to judicial review.

The Court, of course, does not here challenge the authority of the defendant to set rates in accordance with its legislative mandate. The cases are numerous which support the proposition that this is a proper legislative delegation of power and so long as the Authority acts within what has been delegated to it it is beyond judicial review. I do not accept the proposition, however, that all actions undertaken by any public authority necessarily comport with the legislative mandates creating them.

Throughout the proceedings the Authority has constantly implied that it faces a grave crisis and emergency. While this may be true, and the Court fully agrees that the Authority does face a grave emergency, it is also true that this is an emergency which was forseeable and has been for some time. It is on this basis that the Authority grounds its decision to make a rate increase and then grant a hearing to the public as to the reasonableness of those rates, but it should be noted that an agency may not "take precipitate action without a hearing on the ground that it can always cancel out and reconstruct if so advised after hearing. To act in haste, repent at leisure, is not a sound motto for an administrative agency". *Pennsylvania Gas and Water Co.* v. *Federal Power Commission*, 427 F2d 568, 575 (D.C. Cir. 1970). *City of Portland, Oregon* v. *Federal Maritime Com'n.*, 433 F.2d 502 (D.C. Cir. 1970).

In this connection it is well to recognize that the Authority by statute is clothed with a public interest. 30 VIC Sec. 101(f) states "The provisions enacted by this chapter are hereby declared to be necessary in the public interest . . . ." The statement in *F.P.C.* v. *Sierra Pacific Power Co.*, 350 US 348, (1955), that "The purpose of the power given to the Commission . . . is the protection of the Public Interest, as distinguished from the private interests of the utilities, as evidenced by the recital in the Act that the

scheme of regulation imposed is necessary in the public interests", is apropos here. That is, in applying that case to the one at bar, I am not of the opinion that the procedure by which the rates were established reflect an appreciation by the Authority of the legislative mandate as to the public interest.

Title 30 VIC Sec. 105(12) charges the Authority with determining reasonable rates. This must be read in conjunction with the mandate to hold a public hearing in the event rates are increased pursuant to a determination that their "immediate effectiveness" was necessary. A "determination" must be "the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination'. It is implicit in a government of laws and not of men". *Anti-Fascist Committee* v. *McGrath*, 341 US 123, 136 (1951).

In the colloquy between Fred Clarke andthe board members much was made of the fact that a "determination" rather than a decision had been made (Exhibit J p. 36-43). But if a determination had been made, on what basis was it done?

Valentine Lehr, qualified as an expert over defendant's objection, testified that in the field of utility services reasonable rates are based on three factors, to wit:

(1) Cost of production (this would include labor and fuel cost).

(2) Load projections and development of the utility.

(3) Analysis of the type of consumer or consumers which the utility services.

He testified that a rate schedule should reflect the above three factors and that the proposed rate schedule, or indeed the schedule which was in effect as of December 1, 1971, did not do so and for that reason the rate increase is invalid. Mr. Lehr testified that the Jackson and Moreland Report, introduced into evidence as Exhibit B, was not a rate study,

but was rather a revenue study and did not therefore contain the kind of information upon which a proper rate study could be based. Mr. Lehr further testified that he doubted whether the requisite information needed to make a rate study was kept or was available and he cited in support of this failure of the Authority to keep separate accounts for water and power.

This testimony was supported by defendant's own witness, Hans Loeffler. On recross-examination he testified in essence that the Authority could not determine whether the "overall rate structure (was) fair" for the reason that a proper rate study had not been made. It is, therefore, evident that a proper determination had not been made. This is the type of administrative determination condemned in *Anti-Facist Committee,* supra, where the Court also held that "(w)here an act of an official plainly falls outside of the scope of his Authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it". 341 US at 136. Nor is it sufficient for a determination that there had not been an increase in electric rates for the past ten years. I do not here decide whether this was the best determination but only whether it was reasonable and permissible. *Williams* v. *Robinson,* 423 F2d 637 (D.C. Cir. 1970).

I agree with plaintiffs that the hearing denied them requisite procedural due process safeguards. I am impressed in the first instance with the fact that the hearings which were held were before the very Authority which has in the first instance promulgated the increased rates and the person designated as hearing officer is the Attorney General of the Virgin Islands, who represents the Authority in these proceedings.

There is authority that a rate-fixing procedure is a legislative or quasi-legislative proceeding and, therefore, no hearing is constitutionally required. But "(s)ounder is

the view of the Supreme Court in the Morgan case that where facts about the companies were in dispute, 'a proceeding of a quasi-judicial character' (*Morgan* v. *United States,* 298 US 468, 480, 56 S. Ct. 906, 80 L.Ed 1288 (1936) was required, even though rate fixing for the future was involved and even though it had been clearly established that rate fixing for the future was 'legislation, or rule making'." Davis Administrative Law Treatise, Sec. 29.02, p. 126.

Once a hearing is granted, those appearing are entitled to all procedural safeguards to insure that the hearings are fair and orderly. The type of hearing which insures the above embraces not only the right to present evidence, but also "a reasonable opportunity to know the claims of the opposing party and to meet them". *Morgan* v. *United States,* 304 US 1, 18, 585 S. Ct. 733 (1938).

The hearing provided for must be quasi-judicial and it is obvious that plaintiff was not afforded "a reasonable opportunity to known the claims of the opposing party", and the evidence on which the Authority would rely prior to the hearing. The only opportunity apparent here was the somewhat cavalier offer by Mr. Newman to Lon Southerland at the hearing in Christiansted that he could come to Newman's office at any time to inspect his files (Exhibit J., pg. 26-27). It is important in this respect to note that the hearings were held one week after the Authority announced the date of the public hearings. (Exhibit Q) While this may be sufficient time for other types of hearings, the issue involved here was so complex that due process requires a longer period of time for the public to marshall its forces and to scrutinize the evidence on which the Authority would rely. Indeed, it appears that the Jackson and Moreland report, the primary sources for the determination that a rate increase was necessary, was only made available to the public at the hearing on November 18. (Exhibit J). Is it any wonder therefore that "the public seemed apathetic"? (Exhibit K).

I reiterate that I do not decide here that the rates are unreasonable—it may well be that they are for the reason that they should be even higher. I merely hold that the procedure by which they were increased was fatally tainted because of the violation of very fundamental notions of fairness.

The prospect of an emergency in electrical service caused by any default in the convenants of the Series "A" Bonds, the unmarketability of Series "B" Bonds and an inability of the Authority to acquire financing for expansion of services and facilities, poses a realistic consideration for the Court. Therefore, the injunction will issue but the order will be stayed for a period of eight months. Testimony given in the hearings herein have indicated that a proper rate study (and not just a revenue study) will cost somewhere between $60,000 to $100,000 and will take from four to six months. A stay period of eight months should enable the Authority to make a proper determination of a rate schedule and to provide proper public hearings on the proposed rate schedule and the rate study supporting the proposed schedule . If, within that period, it shall be determined that the present rates should be lower, the Authority will have to take appropriate measures to reimburse the power consumers or to allow them a credit for the difference involved in the present rates and the ones which will be properly made. On the other hand, if the determination and subsequent proper public hearings shall support a finding that the present rates are reasonable, then the Authority will not have lost the revenues represented by the recent increase in the rates.

Dated: February 2, 1972

ENTER:

/s/ WARREN H. YOUNG
Judge

Order

IT IS ORDERED that the Opinion heretofore filed be and the same is amended as follows:

A. The second sentence of the last full paragraph is deleted and the following substituted therefor:

> "Therefore, the injunction will issue but the order will be stayed for a period of ten months."

B. The fourth sentence of the last full paragraph is amended by substituting "ten months" in lieu of "eight months".

Dated: February 4, 1972

ENTER:

/s/ WARREN H. YOUNG
Judge

Mailed This 4th Day of Feb. 1972

Findings of Fact and Conclusions of Law

This matter was heard December 21, 1971 on the merits with testimony adduced on behalf of both parties. On December 23, 1971, the Court held a settlement conference but efforts directed toward a settlement were unsuccessful.

Prior to the evidentiary hearing, two hearings had been held on plaintiff's motions for a temporary restraining order and a preliminary injunction, respectively, both of which motions were denied for the failure of plaintiff to show that immediate and irreparable harm would ensue to plaintiff or to its members by denial of such temporary injunctive relief.

Plaintiff appeared at all of the hearings through its attorneys, Isherwood & Colianni, Vincent A. Colianni, Esq. of counsel. Defendant appeared through its attorney, Ronald H. Tonkin, Esq., Attorney General of the Virgin Islands.

The Court rendered a Memordanum Opinion dated February 2, 1972. The opinion recites most of the pertinent findings of facts and conclusions of law. However, this separate document has been prepared to assure that the record contains all of the facts upon which the Court based its opinions.

Findings of Fact

1. The plaintiff, Virgin Islands Hotel Association, Inc., is a non-profit corporation, duly organized under the laws of the Virgin Islands, whose membership includes most of the hotels in the Virgin Islands.

2. Defendant, Virgin Islands Water and Power Authority, is a public corporation created on or about August 21, 1964 by the Legislature of the Virgin Islands with power to sue and be sued (30 VIC 101 *et seq*). Defendant is a municipal utility and is the only electric power utility in the Virgin Islands.

3. Effective December 1, 1971, defendant increased its electric power rates by approximately 20% overall.

4. The change in the rate schedule was made after defendant had received and reviewed a revenue study prepared by Jackson and Moreland (Exhibit B) and after defendant's municipal bond financing consultant had advised defendant that its revenues were falling below the 1.5 ratio of revenues to debt, which defendant was required to maintain pursuant to a bond covenant.

5. 30 VIC 105(12) charges the Authority with determining "reasonable rates" and with holding a "public hearing with respect thereto . . . to give interested per-

sons an opportunity to advise . . . of their views and of evidence and support thereof."

6. Valentine Lehr, a qualified expert witness, testified that a determination of reasonable rates in the field of utility services should be based on three factors, to wit: (1) cost of production (this would include labor and fuel cost); (2) load projections and development of the utility; (3) analysis of the type of consumer or consumers which the utility services. He also testified that the Jackson and Moreland Report was not a rate schedule study and that it was not intended to be anything but a revenue study. He further expressed doubt that the requisite information needed to make a rate study was kept by defendant or was available and cited, in support of this, defendant's failure to keep separate accounts for water and power. This testimony is adopted as a finding of facts.

7. Defendant's witness, Hans Loeffler, who had been employed by defendant in a management capacity, testified, in essence, that defendant could not determine whether the overall rate structure was fair because a proper rate study had never been made. This testimony is adopted herein as a finding of fact.

8. The reference list of statistical, operational and financial material noted in the back of the Jackson and Moreland Report was not readily accessible and available to the public.

9. The Jackson and Moreland Report itself was made available to the public only at the hearing in Christiansted, St. Croix on November 18 (Exhibit J).

10. The public hearings on the increased rates were held within one week after the increased rate schedule was announced and within one week after the times and places were set for the public hearings. The notice of the hearings was a terse press release. No order had been issued by the Authority decreeing the increase, setting forth

the specific rate changes for all classes of customers and stating the findings on which the increase was based.

11. A proper determination of reasonable rates as to a reasonable classification of consumers was never made by defendant.

12. The several public hearings conducted by defendant were legislative in nature and were not evidentiary.

CONCLUSION OF LAW

1. The Court has jurisdiction over the parties and of the subject matter herein.

2. Plaintiff has standing to bring this suit.

3. The interpretation of the statute creating and regulating defendant is a matter of law and, in a suit to enjoin agency action, the Court is free to substitute its own judgment for that of the agency head.

4. The fact that 30 VIC 101 et seq. makes no provision for review of defendant's actions, does not mean that affected persons have no redress for illegal conduct on defendant's part. The action of defendant is subject to judicial review.

5. The public hearings afforded by defendant lacked procedural due process. The public was not afforded "a reasonable opportunity to know the claims of the opposing party" and the evidence upon which the defendant would rely in support of its increased rates.

6. The week that intervened between defendant's announcement of the dates of public hearings and the hearings themselves was an insufficient time by reason of the complexity of the issues involved. Due process requires a longer time, in these circumstances, for the public to

marshall its forces and scrutinize the evidence upon which the defendant relies.

Dated: February 4, 1972

/s/ WARREN H. YOUNG
Warren H. Young
Judge

Judgment

On December 21, 1971 the above captioned matter came on for trial. Plaintiff appeared through its attorneys, Isherwood & Colianni, Vincent A. Colianni, Esq., of counsel. Defendant appeared through its attorney, Ronald H. Tonkin, Esq., Attorney General of the Virgin Islands. The Court heard the testimony of both parties, entered its Findings of Fact and Conclusions of Law and rendered a Memorandum Opinion. The premises considered, it is hereby

ORDERED, ADJUDGED AND DECREED:

(1) that defendant is hereby enjoined from collecting power charges pursuant to the increased electric power rate schedule put into effect as of December 1, 1971. However, such injunction shall be stayed for a period of 10 months;

(2) that if, during said 10 months period, defendant shall make a proper determination of reasonable electric power rates based upon an appropriate rate study and proper public hearings, the injunction herein decreed will terminate as of the effective date of the said new rate schedule;

(3) that if, within said 10 months period, it shall be determined by appropriate studies and public hearings that reasonable rates would require a reduction of one or more of the rates currently in effect, defendant shall

take appropriate measures to reimburse the power consumers or credit them with the difference between its present rates and such rates that shall have been properly determined (the reimbursement or credit to be computed from December 1, 1971 to the date of the new schedule);

(4) that if it shall be determined by appropriate studies and public hearings that the current rate schedule is reasonable, then defendant's current rate schedule shall be continued and be valid retroactively to December 1, 1971; and

(5) that if it shall be determined that a reasonable rate schedule would justify an increase of one or more of the current rates, such increased rates will become effective at such time that will be designated by defendant in the notice of the public hearings which may be conducted by defendant pursuant to the procedure to set a new and reasonable rate schedule.

Dated this 4th day of February, 1972.

/s/ WARREN H. YOUNG
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1118

VIRGIN ISLANDS HOTEL ASSOCIATION, INC.

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY,
Appellant.

On Appeal from the District Court of the Virgin Islands
Division of St. Croix, Christiansted Jurisdiction

ARGUED MAY 26, 1972

Before STALEY, ALDISERT and HUNTER, *Circuit Judges.*

Opinion of the Court

(Filed June 28, 1972)

By STALEY, *Circuit Judge.*

Appellant, Virgin Islands Water & Power Authority, appeals from a judgment of the District Court of the Virgin Islands enjoining the collection of electric power charges pursuant to an increased electric power rate schedule. The action for the injunction was brought by appellee, Virgin Islands Hotel Association, Inc., a non-profit corporation whose membership consists of most of the hotels located in the Virgin Islands.

The instant litigation was precipitated by a press release on November 10, 1971, announcing an electric rate in-

crease approximating 20%.[1] Public hearings were held on the several major islands beginning on November 16, 1971. On December 3, 1971, appellant's Governing Board heard the report on the public hearings and voted to place the new rate schedule into effect. The instant action was initiated on the same day and resulted in the district court's entry of judgment on February 4, 1972, enjoining the collection of power charges under the new rates but staying the injunction for a period of ten months. During the ten month period, appellant is to conduct new hearings and make a new rate study in order to redetermine the propriety of its proposed rates. If the current increases are determined to be reasonable, they will be continued. If reductions are required in these rates, the consumers will be reimbursed or credited with the difference between the current rates and whatever rates are determined, to be computed from December 1, 1971. If the appellant determines that certain rates would require even a greater increase than was announced on November 10, 1971, then such rates will become effective pursuant to the statutory procedure for setting new rates.

Appellant asserts, *inter alia,* that appellee has no standing to challenge the actions of the Authority, that the actions of the Authority in establishing a general rate schedule are not subject to judicial review by the District Court of the Virgin Islands, that the Authority fully complied with the procedures required by statute in determining the new rate schedule, and that there is no evidence on the record that appellant's actions were arbitrary or unreasonable or that the new rate schedule is unreasonable.

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[1] At oral argument counsel for appellant stated that the over-all average increase was 21.2%. Broken down into classes of power consumers, the increases were as follows: residential, 18.8%; commercial, 18.8%; large power, 24.8%; street lights, 20.2%. Counsel stated that most of the hotels in the Virgin Islands fall into the large power class.

We must first examine appellant's argument that the district court had no jurisdiction over the subject matter of this action. This argument begins with the contention that the appellant is an autonomous governmental instrumentality and under the statutes of the Virgin Islands is vested with exclusive and plenary authority to operate and manage its utility system. Appellant asserts that this authority was specifically delegated as a legislative function of the Virgin Islands Legislature. Appellant argues that since it is, by law, not subject to the jurisdiction of other agencies, departments, officers, and persons, and since it exercises delegated legislative authority, its action in adopting the rate increase was not subject to judicial review by the District Court of the Virgin Islands.

The applicable statute, 30 V.I.C., § 101 *et seq.*, makes no provision for judicial review of the Authority's actions. Generally, however, a strong presumption exists in favor of review which can be overcome only by clear and convincing evidence that the Legislature intended otherwise. See, e.g., Barlow v. Collins, 397 U.S. 159, 167 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

In support of its contention, appellant relies on Langevin v. Chenango Court, Inc., 447 F.2d 296 (C.A.2, 1971); and Hahn v. Gottlieb, 430 F.2d 1243 (C.A.1, 1970), both dealing with judicial review of FHA approved rent increases. In both *Langevin* and *Hahn* the court ruled that FHA decisions approving rent increases by private corporations receiving Federal subsidies were not subject to judicial review. We note that in each case the circuit court was considering a Federal agency action and applying the Administrative Procedure Act, specifically § 702 of that Act. (Title 5, United States Code.) Each court held, based on different rationales, that judicial review was not available. In the instant case, however, we are confronted with an administrative arm of a territorial legislature.

It was disputed at oral argument that changes in the general rate structure could have been made by the Virgin

Islands Legislature, and it is clear that the Authority exercised delegated legislative power when it acted to increase the rates. On the basis of the rationale of Judge Coffin's opinion in Hahn v. Gottlieb, *supra*, we rule that the judgment or expertise of the Authority in setting the electric power rates is a matter committed to its discretion by law and is not subject to judicial review. See also, Huntt v. Government of the Virgin Islands, 382 F.2d 38, 44 (C.A.3, 1967).

However, in both Langevin v. Chenango Court, Inc., 447 F.2d at 304, and Hahn v. Gottlieb, 430 F.2d at 1251, the court expressly stated that its holding of nonreviewability did not extend to "those rare cases where the FHA has ignored a plain statutory duty, exceeded its jurisdiction, or committed constiutional error." In the instant case, the plaintiff alleged and the district court found that appellant had ignored a statutory duty to provide a proper and meaningful hearing, and that appellant had committed constitutional error by denying plaintiff due process of law.

In our view, this appeal involves one of "those rare cases" where, because noncompliance with its statutory duties and constitutional infringement are alleged against the Authority, judicial review is available.

Appellant next denies the standing of appellee Hotel Association to challenge its actions. It contends that the Association is a nonprofit corporation which does not use electric power, is not a taxpayer, and in fact conducts no business in the Virgin Islands. It asserts that the Hotel Association has failed to establish that it will sustain injury as a result of the electric rate increase and therefore lacks standing to challenge the increase.

Appellant's argument is without merit. An organization whose members are "injured" may represent those members in a proceeding for judicial review. NAACP v. Button, 371 U.S. 415, 428 (1963). The complaint in the

instant case specifically asserted that the individual member hotels would suffer irreparable economic injury by virtue of the electric rate increases. Indeed, in its most recent opinion on the point at issue, Sierra Club v. Morton, —— U.S. ——, 40 L.W. 4397 (Apr. 18, 1972), the Supreme Court made it clear that individual harm to an organization's members would give the organization standing to challenge an administrative action. In addition, the district court found, and we agree, that the interest sought to be protected here by the Association is within the zone of interests to be protected or regulated by the statute as required by Data Processing Service v. Camp, 397 U.S. 150 (1970).

We hold, therefore, that the Hotel Association has standing to challenge the legality of the Authority's action.

Having determined that there exists jurisdiction and standing, we can turn to an examination of the merits of this appeal. The essential issue and the crux of this entire matter involves the hearing mandated by 30 V.I.C. § 105(a)(12).[2] The Authority is directed to hold a public

[2] 30 V.I.C. § 105(a)(12) provides the Authority with power:

"(12) *to determine,* fix, alter, charge, and *collect reasonable rates,* fees, and other charges for the use of the facilities of the Authority, or for the services, water, electric power, or other commodities rendered or furnished by it, which shall be at least sufficient, together with all other available moneys, revenues, income and receipts of the Authority from all sources, for the payment of the expenses of the Authority incurred in connection with the repair, maintenance, use and operation of its facilities and properties, for the payment of the principal of and the interest on its bonds, and for fulfilling the terms and provisions of such covenants as may be made with, or for the benefit of, the purchasers or holders of any bonds of the Authority; Provided, That in fixing rates, fees, and other charges for water and electric power, the Authority shall have in view the encouragement of the widest

hearing with respect to any changes in the general rate structure to give interested persons an opportunity to advise the Governing Board of their views and of evidence in support thereof. The district court ruled that such a hearing must of necessity be quasi-judicial, embracing all the procedural safeguards of due process of law. The Authority has argued vigorously that rate fixing is a function delegated to it by the Legislature, and that only a legislative hearing is required to which standards of due process are inapplicable.

We find it unnecessary to characterize the hearing as quasi-judicial or quasi-legislative. As Judge Friendly stated in Langevin v. Chenango Court, Inc., 447 F.2d at 301, such a distinction has long since gone to a deserved repose. The rate fixing procedure created by 30 V.I.C. § 105(a)(12) contemplates a *meaningful* public hearing at which interested persons can present their views and present *evidence in support thereof.* Concomitant with such a hearing are the essential requirements of adequate

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economically possible use of water and electric power consistent with sound fiscal management; and in this connection it is the intention of the Legislature that in fixing such rates, fees and other charges the Authority shall take into account the respective expenses, as hereinbefore enumerated in this subparagraph, for the water and electric power systems; Provided, further, That initially, the Authority shall adopt the existing rates, fees and other charges for water and power, and that, thereafter, before changes in such general rate structure for water or electric power are made, or, in cases where the Board shall decide to make such changes and deems the immediate effectiveness thereof to be necessary, then within a reasonable time after such changes are made, *a public hearing shall be held with respect thereto before the Board, or before such hearing officer or officers as the Board may designate to give interested persons an opportunity to advise the Board of their views, and of evidence in support thereof,* and upon such hearing, the Board, pursuant to the powers, duties, and obligations vested in it by this chapter, may alter, suspend, or revoke such changes;" (Emphasis supplied.)

notice, dissemination to the public of the facts and figures on which the Authority relies, and an opportunity afforded to those attending the hearing to rebut such facts and figures.

These essential requirements were not met in the instant case. The hearings were begun one week after the press release regarding the rate increases. The rate study on which the new rate structure was based was not generally available.[3] We agree with the district court's finding that the underlying facts involved in the announced increase were quite complex and that a week was far too little time for the public to marshall its forces and prepare a case in opposition to the increase. Moreover, the failure of the Authority to make generally available the primary source for its determination that increases were necessary only underscores the shortcomings of these hearings. It is thus clear that appellant, Virgin Islands Water & Power Authority, failed to comply with the statutory procedures set forth in 30 V.I.C. § 105(a)(12) in acting to change the general electric power rate schedule.

The district court enjoined the collection of rates under the new schedule but stayed the injunction for a period of ten months from February 4, 1972. The district court's judgment requires appellant to make "* * * a proper determination of reasonable electric power rates based upon an appropriate rate study and proper public hearings * * *." There is no duty imposed by 30 V.I.C. § 105 (a)(12) to make rate studies as such, and our decision in this case is limited to the consideration of appellant's com-

[3] Appellant contended at oral argument that the materials were available to those persons interested in reviewing them had they requested to see them. It was admitted, however, that the first actual opportunity to examine the rate study relied on for the increases came at the third hearing. We do not consider such a belated offer to be within the letter or spirit of the essential prerequisite for a meaningful hearing.

pliance with its statutory duties. We will affirm the district court but direct that its judgment be modified to require the Authority to conduct public hearings consistent with this opinion. Following such hearings, the Authority will be required to reconsider the matter of changes in the general electric rate schedules in light of the views expressed and evidence presented at those hearings.

The cause will be remanded to the district court for further proceedings consistent with this opinion.

To the Clerk:

File the foregoing opinion.

Circuit Judge.

Judgment

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 4, 1972, be, and the same is hereby affirmed, but said judgment shall be modified to require the Authority to conduct public hearings consistent with the opinion of this Court. Following such hearings the Authority will be required to reconsider the matter of changes in the general electric rate schedules in light of the views expressed and evidence presented at those hearings. This case is remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against appellant.

ATTEST:

/s/ THOMAS E. QUINN
Clerk

June 28, 1972

APPENDIX E

VIRGIN ISLANDS WATER AND POWER AUTHORITY
VIRGIN ISLANDS OF THE UNITED STATES
ST. THOMAS, VIRGIN ISLANDS

Resolution No. 101

[Adopted September 18, 1972]

WHEREAS, the Authority has power pursuant to Title 30 of the Virgin Islands Code, § 105(A)(12) to determine, fix, alter, charge and collect reasonable rates, fees and other charges for the use of the facilities of the Authority or for the services, water, electric power or other commodities rendered or furnished by it; and

WHEREAS, pursuant to said Title 30 of the Virgin Islands Code, § 105(A)(12) those rates shall be at least sufficient, together with all other available monies, revenues, income and receipts of the Authority from all sources for the payment of the expenses of the Authority incurred in connection with the repair, maintenance, use and operation of its facilities and property for the payment of the principal and interest on its bonds and for fulfilling the terms and provisions of such covenant as may be made with or for the benefit of the purhasers or holders of any bond; and

WHEREAS, in fixing its rates, fees and other charges for water and electric power the Authority shall have in view the encouragement of the widest economical possible usage of water and electric power with sound fiscal management, and shall take into account the respective expenses for the water and electrical power system; and

WHEREAS, in cases where the Board shall decide that it is necessary to make changes in the general rate structure for water or electrical power and deems the immediate effectiveness thereof to be necessary, then within a reasonable time after such changes are made a public hearing

shall be held with respect thereto before the Board or before such hearing officer or officers as the Board may designate to give interested persons an opportunity to advise the Board of their views and of evidence in support thereof, and upon such hearing the Board, pursuant to such powers, duties and obligations vested in it may alter, suspend or revoke such changes; and

WHEREAS, the Authority's power revenues have not kept pace with the ever increasing cost of operations, especially fuel cost; and

WHEREAS, the Authority must maintain a sound financial position in order to insure that it can undertake new bonds to finance its necessary growth programs; and

WHEREAS, the Authority's financial consultants, Wainwright & Ramsey, on July 16, 1971 advised that an increase in the Authority's earnings is required if the Authority is to borrow the monies needed in December 1972; and

WHEREAS, the Authority, on December 3, 1971, approved the adoption of a Resolution placing a revised rate schedule into effect; and

WHEREAS, it was determined that pursuant to Title 30 Virgin Islands Code, § 105(A)(12), public hearings should be held with respect thereto before the Board; and

WHEREAS, notices of public hearings on the said rate schedule were published in *The Home Journal, The Daily News, St. Croix Avis, West End News, and Virgin Islands Free Press,* on August 12, 15, 19, 22, 26, 29 and September 2, 6, 7, 8, 9, 10, 11, 12 and 13, copy of which is attached hereto; * and

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* The attachments to this resolution are omitted here. They are included, however, in the record below.

WHEREAS, hearings on the said rate schedule were held on September 11, 1972 at the Julius Sprauve School, St. John, at 7:30 P.M.; on September 12, 1972, at the Senate Office Building, St. Thomas; and on September 13, 1972, at the Concordia School Auditorium, Frederiksted, St. Croix, at 2:00 P.M., and at the Government House Ballroom, Christiansted, St. Croix, at 7:30 P.M.; and

WHEREAS, said hearings were attended by a quorum of the Governing Board of the Authority consisting of Commissioner of Public Works, John Harding, Vice-Chairman; Budget Director Magdalene Bryan, Secretary; and Members, John P. Scott, David C. Canegata and Raymond J. Smith; and

WHEREAS, Robert E. Bathen, of R. W. Beck Associates, C. D. Hornburg, of DDS Engineering, Inc., Steven A. Kokolski, of Jackson and Moreland, and Francis X. Fleischmann, of Wainwright and Ramsey, made statements as expert witnesses for the Authority; and

WHEREAS, such hearings were for the purpose of giving interested persons an opportunity to advise the Board of their views and of evidence in support thereof; and

WHEREAS, the Board reviewed and made available to the public the two Jackson and Moreland reports and the R. W. Beck & Associates report on August 8, 1972, and the DDS Engineerings, Inc. report on August 29, 1972, on which among other factors the Governing Board relied in determining the reasonableness of the rates to be changed, and provided an opportunity to those attending the hearing to give testimony and rebut such facts, figures and reports, and to inquire of the parties who made the report to the Authority as to the basis upon which those reports were made; and

WHEREAS, the Governing Board has thoroughly reviewed the reports made to it and all other relevant facts

and figures and the views and evidence presented at the public hearings; and

WHEREAS, the Board had determined that the rates in effect since December 1, 1971 are fair and reasonable and are still required in order for the Authority to maintain a sound financial position and satisfy its statutory obligations.

NOW THEREFORE, BE IT RESOLVED:

That the electric rate schedule that became effective for billing after December 1, 1971 for residential service, commercial service, small power service, large power service and security light, copies of which are attached hereto, are to be effective as of December 1, 1972, for all meter readings on or after that date.

APPENDIX F

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Civil No. 499/1971

ACTION TO ENJOIN RATE INCREASE

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.), INC.,
Plaintiff

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY,
Defendant

Final Order

Defendant's Motion to Vacate Injunction came on for hearing before this Court on September 29, 1972. The Court having received legal memoranda, including evidentiary data pertaining to the scheduling of public hearings, notice thereof, the manner in which the hearings were conducted, the dissemination of engineering and revenue studies and reports supporting the proposed rates; and the Court having heard arguments of counsel and being otherwise sufficiently informed in the premises, the Court finds that the Authority has conducted public hearings consistent with the decree of this Court as modified by the Court of Appeals for the Third Circuit on June 28, 1972.

NOW, THEREFORE, it is

ORDERED, that the injunction in the above-captioned action be, and the same hereby is, vacated.

Dated: October 3, 1972.

ENTER:

/S/ WARREN H. YOUNG
Warren H. Young
Judge

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1996

VIRGIN ISLANDS HOTEL ASSOCIATION, INC., (U.S.), a Corporation,

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.),
Appellant..

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

Argued January 19, 1973

Before VAN DUSEN and ADAMS, *Circuit Judges*, and BARLOW, *District Judge*

EVELYN N. COOPER, ISHERWOOD & COLIANNI
St. Croix, V. I.,
for Appellant

RONALD H. TONKIN, Attorney General of the Virgin Islands,
SIDNEY H. MCKENZIE, III, Assistant Attorney General of the Virgin Islands
St. Thomas, V. I.
WALLACE L. DUNCAN, DUNCAN & BROWN,
Washington, D. C.,
for Appellee

Opinion of the Court

(Filed April 12, 1973)

VAN DUSEN, *Circuit Judge.*

This is the second time that these parties, the Virgin Islands Hotel Association (the Hotel Association) and the Virgin Islands Water and Power Authority (the Authority), are before this court. On the first occasion, in *Virgin Islands Hotel Ass'n* v. *Virgin Islands Water & Power Authority*, 465 F.2d 1272 (3d Cir. 1972), this court upheld with modification an injunction the district court had issued against the Authority. By order of October 3, 1972, the district court vacated that injunction, and the Hotel Association appeals. We affirm the October 1972 order of the district court.

I. BACKGROUND

It is necessary only to summarize the facts stated in our earlier opinion and in the first opinion of the district court, reported at 54 F.R.D. 377 (D. V. I. 1972).

In the late fall of 1971, the Authority became worried that its revenues would soon fail to provide the coverage over interest required by its outstanding debt instruments, with devastating impact on its ability to procure additional needed financing On November 10, 1971, it issued a press release indicating its intention to raise electric rates by from about 19% for residential users to about 25% for large power users. Public hearings were held one week later, and on December 3 the Authority put the proposed increases into effect.

The Hotel Association was understandably upset, since its members are classified as "large power" users. It immediately sought an injunction against the rate increase. The district court ruled that the Authority had violated 30 V.I.C. § 105(a)(12) in two ways. First, because the Authority did not have at its disposal information on

the cost of providing electricity to its various classes of customers, the Authority had failed "to determine . . . reasonable rates." Second, the public hearings held pursuant to this section 105(a)(12) were altogether inadequate. Among other defects, notice to the public was too short to allow adequate preparation time and the reports the Authority relied on were not available publicly until the first public hearing. The district court, on February 4, 1972, ordered the Authority to rescind the increases, to have made an appropriate study of costs (called a "rate" study), and to hold proper public hearings on the proposed increases. However, to avoid possible disruption, the court stayed this injunction for ten months.

By decision of June 28, 1972, this court, although ruling that the Authority's determination of rates is not subject to judicial review, held that review is available when the Authority has "ignored a plain statutory duty, exceeded its jurisdiction, or committed constitutional error." 465 F.2d at 1275. "The rate fixing procedure created by 30 V.I.C. § 105(a)(12) contemplates a *meaningful* public hearing at which interested persons can present their views and present *evidence in support thereof*. Concomitant with such a hearing are the essential requirements of adequate notice, dissemination to the public of the facts and figures on which the Authority relies, and an opportunity afforded to those attending the hearings to rebut such facts and figures." *Id.* at 1276. This court agreed with the district court that the Authority's hearings did not comply with these requirements. This court did not, however, agree that § 105(a)(12) imposed any duty "to make rate studies as such," *id.* at 1276, and modified the district court injunction accordingly.

To comply with this court's mandate, the Authority commissioned new reports from R. W. Beck & Associates and from D. S. S. Engineering, Inc. (hereinafter D. S. S.); it also had Jackson & Moreland prepare an update of the

report they had prepared earlier. On July 5, 1972, the Authority issued a press release stating, *inter alia*, that new hearings would be held and that the earlier Jackson & Moreland study was available to the public. Beginning on August 12, 1972, the Authority had published in the local newspapers notices that new public hearings would be held on September 11, 12 and 13. The Authority made the Beck and the Jackson & Moreland reports available to the public on August 8, the D. S.S. report on August 28.

The Authority held these hearings as scheduled. At each hearing various officials of the Authority commented on the proposed rate increase, and representatives from the three engineering firms summarized and discussed the contents of their reports. In accordance with the procedure announced at the beginning of each meeting, all persons could submit written questions, which would be answered by either an official of the Authority or a representative from one of the firms. In addition, all persons could submit written statements or, at the conclusion of the Authority's presentation, deliver oral statements. According to an affidavit of the Authority's Executive Director, "All questions which were asked were responded to. In addition, any person desiring to make a statement with regard to the proposed subject rate increases were [sic] permitted to do so."[1]

The Secretary of the Hotel Association's St. Thomas-St. John Chapter testified at the September 12 hearing held on St. Thomas.[2] In addition, counsel for the Hotel Association and an expert the Association had hired, Constance W. Bary, attended the September 13 hearing held at

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[1] This affidavit was submitted with the Authority's Motion to Vacate Injunction. The Hotel Association neither filed a counter-affidavit nor disputed these assertions at the September 1972 hearings held on the motion.

[2] Transcript of September 13 hearing at Christiansted, at 74-75; September 29 hearing on Motion to Vacate Injunction, at 7-9.

Christiansted on St. Croix. Counsel objected to the testimony not being sworn and not being subject to oral cross-examination.[3] Counsel had no written questions to submit, but was allowed to give orally an "offer of proof" of what the Hotel Association would have established if an opportunity for cross-examination had been granted.[4] Admitting that Mr. Bary had not been contacted until September 7, such counsel also requested that the hearing be adjourned until November 9. This adjournment would give the Authority time to prepare, and for Mr. Bary to review, data which counsel said were necessary to examine the reasonability of rates.[5] Counsel and Mr. Bary then stated that without such data the Hotel Association was unable to demonstrate the unreasonableness of the proposed rates.[6]

Following the hearings, the Authority determined that the rates it had proposed the previous December were reasonable. The Authority then filed a motion in the district court to vacate the injunction. The district court, after considering the Hotel Association's allegations of substantive and procedural infirmities, vacated the injunction by its October 1972 order.

II. Procedural Issues

The Hotel Association argues either that the September 1972 hearings did not comply with 30 V.I.C. § 105(a)(12) as interpreted by this court in deciding the previous appeal or that, assuming compliance, the statute itself fails to provide the due process of law required by 48 U.S.C. § 1561 (1970). Specifically, the Hotel Association urges that the notice of the hearings and the prior dis-

[3] Transcript of September 13 hearing at Christiansted, at 7-12.

[4] *Id.* at 51-57.

[5] *Id.* at 59.

[6] *Id.* at 63, 67-71.

semination of the engineering studies were inadequate; that these deficiencies were perpetuated by the denial of the adjournment it requested; that the hearings themselves should have been trial-type, rather than legislative-type; that they should have been conducted by an impartial hearing officer; and that in making its final decision the Authority improperly relied on evidence not in record.

"Whether [due process] requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960). *Accord, Goldberg* v. *Kelly,* 397 U.S. 254, 263 (1970); *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission,* 420 F.2d 577, 589-90 (D.C. Cir. 1969).[7]

While this court, in its prior opinion, did not state precisely how many days in advance the schedule of the new hearings had to be announced or the reports disseminated, it stressed the importance of notice and dissemination adequate under the circumstances. To be considered, for example, was the complex nature of the data.

The Hotel Association now complains that notice of about one month was too short. What the Hotel Association in effect asks us to ignore is the district court's injunction which had been stayed for only ten months. As of June 28, when this court handed down its affirmance of that injunction, it was clear to all concerned that the

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[7] We note that the Authority's decision as to rates concerns rates which the members of the Hotel Association must pay. That factor distinguishes this case from cases such as *Morgan* v. *United States,* 298 U.S. 468 (1936), where an arm of the Government fixed prices that regulated persons could *charge to customers.* The distinction is that the latter situation is much more fraught with the potential for taking without just compensation and, consequently, places heavier demands on procedural due process. We recognize, however, that there could be such a taking in the present situation.

Authority would have to hold new hearings. Moreover, the July 5th press release was sufficient to warn the Hotel Association of the need to retain its expert. Thus, the Hotel Association has only itself to blame for waiting until the end of August before seeking an expert qualified to present its case. Similarly, the question whether or not the public had enough time to evaluate the three engineering studies should be considered in light of the ability of the public under these circumstances to have been ready for the reports. We are not prepared to reverse the decision of the district court and rule as a matter of law that notice and dissemination were inadequate.

The Hotel Association's request for a two-month adjournment was properly denied, particularly since the Hotel Association did not make the request sooner, for example, when the schedule of meetings was announced, but at the last meeting held. Moreover, the argument the Authority presented to the district court, that any additional delay would seriously hamper the sale of new bonds, is a persuasive factor.[8]

The Hotel Association's most telling argument is that the hearings should have been conducted not as legislative hearings but as adversary proceedings. The chief difference between the two modes as regards this case is that a trial-type hearing typically permits oral cross-examination of witnesses.[9] Our earlier opinion did not decide this question.

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[8] September 29, 1972, hearing on Motion to Vacate Injunction, at 9. Counsel for the Authority reiterated the desirability of a prompt resolution in oral argument before this court. Apparently one practical, and perhaps legal, requirement of selling these municipal bonds is an opinion letter from counsel that there is no litigation in progress which would materially affect the bonds.

[9] The Hotel Association also is dissatisfied with the failure of the testimony to be sworn. Because the persons who testified did so in their professional capacities, it does not seem particularly significant that they were not under oath.

The Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1970), is instructive. Rulemaking proceedings are controlled by § 533, which requires only that interested parties be given adequate notice of the proposed rule, *see* § 553(b), and "an opportunity to participate in the rule making through submission of written data, views or arguments with or without opportunity for oral presentation," § 533(c). The procedure for adjudication is set out in §§ 554 and 556, under which "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts," § 556(d). If the Administrative Procedure Act governed the Authority's rate-making, the appropriate proceeding would be rulemaking, because the rates in question have only prospective application. § 551 (4); *Law Motor Freight, Inc.* v. *CAB*, 364 F.2d 139, 143-44 (1st Cir. 1966); *see Jones* v. *District of Columbia*, 323 F.2d 306, 308-09 (D.C. Cir. 1963).[10]

A second distinction which has been relied on by the federal courts is whether the proposed agency action affects a small or a large number of persons. *Compare Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915), *with Londoner* v. *Denver*, 210 U.S. 373 (1908). The two rationales underlying this distinction are that decisions affecting large numbers of persons are likely to be more concerned with general policies than with specific facts and that permitting many persons to cross-examine each witness would make proceedings totally unmanageable. *See United States* v. *Florida East Coast Railway Co.*, —— U.S. ——, 41 U.S.L.W. 4247

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[10] *Law Motor Freight* also holds that, as regards setting agency policy for the future, 5 U. S. C. § 553 provides due process of law. *Accord, NLRB* v. *Delaware Valley Armaments, Inc.*, 431 F. 2d 494, 499 (3d Cir. 1970); *California Citizens Band Association, Inc.* v. *United States*, 375 F. 2d 43, 50 (9th Cir. 1967).

(U.S., Jan. 22, 1973). In the present case, of course, the proposed increases affected every person in the Virgin Islands. We do not know, however, that there would have a multitude of cross-examiners at the September hearings if cross-examination had been available.

A third factor, somewhat overlapping the second, is whether the facts in question are "legislative" or "adjudicative." *See* 1 K. C. Davis, Administrative Law Treatise, § 702 (1958). That is, will the agency decision depend chiefly on policy considerations or on specific, especially historical facts which are provable or disprovable? The Authority's decision here appears to have been made, as 30 V.I.C. § 105(a) provides, in reliance on both types of facts—for example, the costs of providing electric service to its various classes of customers and "making the benefits [of water and electric power systems] available to the inhabitants of the Virgin Islands in the widest economic manner consistent with sound fiscal management, and by this means to promote the general welfare and increase commerce and prosperity . . . ." § 105(a).

While Professor Davis would thus suggest that cross-examination would be appropriate at least as to the adjudicative facts, a number of courts have held in cases which, like the one before us, involved complex and technical factual controversies, that written submissions, possibly supplemented by oral argument, suffice. *United States* v. *Florida East Coast Railway Co., supra; Phillips Petroleum Co.* v. *F.P.C.*, ——F.2d —— (Nos 71-1659, 71-1739, 72-1134, 72-1167, 10th Cir., Feb. 20, 1973); *National Air Carriers Association* v. *CAB*, 436 F.2d 185, 191-94 (D.C. Cir. 1970); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624 (D.C. Cir. 1966); cases cited note 10. One recent case countenances the restriction that questions be submitted in writing. *International Harvester Co.* v. *Ruckelshaus*, No. 72-1517 (D.C. Cir., Feb. 10, 1973), slip opinion at 18-23. On the other hand, the absence here of any specific statutory

procedures such as the Administrative Procedure Act necessitates greater leeway than those courts had.

The present case does not compel us to hold that cross-examination will never be required in hearings under 30 V.I.C. § 105(a)(12).[11] Instead, we rely on the failure of the Hotel Association to have demonstrated the inadequacy of written questions, which were permitted. The Hotel Association could easily have informed itself of this aspect of the Authority's procedures by attending the September 11 meeting. In fact, a representative of the Hotel Association did attend the September 12 meeting on St. Thomas and no doubt could have told counsel in time to prepare for the September 13 hearing that questions had to be in writing. We have carefully examined the Hotel Association's "offer of proof" at the September 13 hearing, and no reason appears to us that the points there raised could not have been formulated in written questions. Consequently, we hold that the Hotel Association has not shown that it was prejudiced, and on this basis we decline to reverse the district court. *See Woodbury* v. *McKinnon*, 447 F.2d 839, 844 (5th Cir. 1971); *Citizens for Allegan County, Inc.* v. *FPC*, 414 F.2d 1125, 1134 (D.C. Cir. 1969).

The Hotel Association's other two procedural claims can be quickly disposed of. First, it did not appear that the officials who conducted the hearings in any way intimidated counsel for the Hotel Association or otherwise de-

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[11] This court is reluctant to hold that cross-examination is never needed, since the Authority has such broad discretion not subject to judicial review, see 465 F.2d at 1274, and since, in the view of several commentators, cross-examination of experts on technical matters can contribute significantly to the decision-making process. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Reform*, 118 U. Pa. L. Rev. 485, 521-24 (1970); Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. Pa. L. Rev. 39, 95-97 (1971); *Comment, Public Participation in Federal Administrative Proceedings*, 120 U. Pa. L. Rev. 702, 743-44 (1972).

However, as noted at page 11 above, several federal cases have held that cross-examination is not mandated in such a situation.

prived it of privileges available to other participants. Moreover, because the Board of the Authority had the responsibility for the final decision on the rate increases, it is not at all evident how having a trial examiner take testimony would have altered that decision in any way. Second, in claiming that the Authority went beyond what was in the record at the hearings, the Hotel Association relies on certain language in the resolution in which the Authority adopted the increases. We find that the Hotel Association's interpretation of this language is contrary to its obvious meaning.

III. Substantive Issues

The Hotel Association contends that the Authority did not have adequate information on which to determine whether or not the rates were reasonable. The essence of this argument is that the Authority does not know how to allocate various expenses between water and power distribution and does not know how much it costs it to supply power to the various types of power users. However, the three engineering studies introduced at the hearings seem to provide just this type of information. The Hotel Association has clearly failed to demonstrate the type of statutory violation subject to review by this court. *See V. I. Hotel Association* v. *V. I. Water & Power Authority, supra,* 465 F.2d at 1274.

Finally, we note that the Hotel Asociation did not attempt to establish in the Authority's September 1972 hearings or in the subsequent district court proceeding, and does not now urge, that the increase in electric rates is confiscatory. At the district court proceeding held on December 21, 1971, where the Hotel Association challenged the first set of hearings held by the Authority, there was uncontradicted testimony by various witnesses that the electric power bills of Virgin Islands hotels accounted for between four and eight percent of all operating costs

(including debt service). *See* N. T. 136, 143, 145-46, 153. With the proposed increase in mind, the district court at that time computed that the rate increases would increase overall operating costs by about two percent an amount which it concluded was not going to put the hotels out of business. N. T. 175-76.[12]

The October 3, 1972, order of the district court will be affirmed.

Judgment

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 3, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ THOMAS E. QUINN
Clerk

April 12, 1973

Concurring Opinion

ADAMS, *Circuit Judge,* Concurring

I concur in the result reached by the majority opinion in this case.

The appellant raises two contentions in this appeal: (1) that the procedures are inconsistent with the due

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[12] The Hotel Association made no attempt to offer similar data at the September 1972 district court hearing.

process clause of the Constitution, and (2) that the procedure employed by the Virgin Islands Water & Power Authority contravenes the statute under which the rate increases were to be approved.

The opinion in *United States* v. *Florida East Coast Railway Co.*, —— U.S. ——, 41 U.S.L.W. 4247 (U.S. Jan. 22, 1973) is the most recent pronouncement by the Supreme Court on the type of proceeding acceptable when an administrative agency promulgates a new rate schedule. The opinion makes clear that, at this time, there is no requirement of a traditional adversary hearing in a broad rate-making context; such a deficiency is not violative of due process.[1]

In the present case, we are dealing with rate-making proceedings conducted pursuant to a statutory plan of the legislature of the Virgin Islands, as interpreted by

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[1] In *United States* v. *Florida East Coast Ry., supra*, the railroad challenged the establishment by the Interstate Commerce Commission of incentive per diem rates on freight cars. These rates were promulgated after a hearing which did not include several of the elements of an adversary proceeding. Upholding the implementation of the rates, the Court stated that the Commission's procedures satisfied the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* and were "not inconsistent with prior decisions of this Court." 41 U.S.L.W. at 4254. Several of these earlier decisions, *e.g.* Morgan v. United States, 304 U.S. 1 (1938); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937); ICC v. Louisville & Nashville R. Co., 227 U.S. 88 (1913), had been thought by some to indicate that due process in rate-making procedures included a requirement of "trial-type" hearings. Justice Douglas, dissenting in *Florida East Coast Ry. Co.* asserted:

> "I do not believe it is within our traditional concepts of due process to allow an administrative agency to saddle anyone with a new rate, charge, or fee without a full hearing that includes the right to present oral testimony, cross-examine witnesses and to present oral argument." 41 U.S.L.W. at 4254.

this Court. *Virgin Islands Hotel Ass'n* v. *Virgin Islands Water & Power Authority*, 465 F.2d 1272 (3d Cir. 1972). The import of our earlier decision was that in rate-making proceedings pursuant to the statute in question a "meaningful hearing"[2] must be afforded those who would challenge the proposed rates. The parameters of such a hearing have not yet been delineated in any particularity.

Although as stated above, the traditional adversary "trial-type" proceedings do not appear to be mandated by the Constitution, I believe that in matters as important as the establishment of utility rates for large groups of citizens and businesses, a greater degree of precision and equity can be established when those opposing the proposed rates have an adequate opportunity to review the proposal with its supporting data, and an occasion to test the proposed rate and its underlying bases through the medium of cross-examining those responsible for its promulgation. Perhaps in the context of utility rate-making these would be central ingredients of a truly "meaningful" hearing.[3]

Th proper resolution of this case, however, does not require that we reach the more difficult question, i.e., were the proceedings in this case so deficient so as not to comport with the concept of "meaningful hearing." As the majority opinion points out, counsel for the Hotel Association did not object to the amount of time allotted

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[2] 465 F.2d at 1275.

[3] An impartial presiding officer at any proceeding would also appear to be an important element in insuring a "meaningful" hearing. In the present case the proceedings were chaired by the Vice-Chairman of the Water & Power Authority with the aid of an Assistant Attorney-General of the Virgin Islands. Although in view of the disposition of this case, this factor does not render these hearings other than a "meaningful hearing," my concern with an arrangement that places the control of the meeting in the hands of the proponent of the rate increase, and the proponent's counsel, must be noted.

for study of the proposal at the time of its dissemination. In addition, counsel did not establish, certainly on the record, the various inquiries or lines of inquiry the Hotel Association would have propounded had they been given the opportunity to cross-examine the proponents of the rate, nor did counsel avail himself of what opportunity for questioning was afforded him.

For these reasons, I concur in the result reached in this case.

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1996

VIRGIN ISLANDS HOTEL ASSOCIATION, INC. (U.S.),
a Corporation

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.),
Appellant

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, *Circuit Judges*, and BARLOW, *District Judge*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ VAN DUSEN
Judge

Dated: May 23, 1973

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SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-486

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.), INC., A CORPORATION,
Petitioner,

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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Petitioner,

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions, judgments and orders of the United States Court of Appeals for the Third Circuit and the District Court for the Virgin Islands to which the Petition is directed are accurately and adequately set forth in the Appendix filed by Petitioner.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit correctly found that the principles of administrative law established by this Court in *United States* v. *Florida East Coast Railway Co.*, —— U.S. ——, 93 S. Ct. 810 (1973), justified the nature and conduct, by the Respondent, Virgin Islands Water & Power Authority (hereinafter Authority), of the administrative procedures employed herein?

2. Whether, in sustaining the decision of the District Court of the Virgin Islands to dissolve the injunction against Authority's ratemaking proceedings, the United States Court of Appeals for the Third Circuit correctly concluded that a traditional adversary hearing, including the taking of sworn testimony, was unnecessary under the standards of due process and to meet the procedural requirements of 30 VIC, § 105(a)?

3. Whether, on the basis of the full record before the United States Court of Appeals for the Third Circuit, it can be concluded that the Petitioner was prejudiced by the administrative procedures employed by the Authority in the proceedings herein?

4. Whether, in sustaining the District Court of the Virgin Islands, the United States Court of Appeals for the Third Circuit correctly ruled that the Authority violated no principle of constitutional law applicable to administrative ratemaking proceedings?

STATUTE INVOLVED

The Statute involved is the Virgin Islands Water and Power Authority Act, Title 30, Virgin Islands Code, § 101, *et seq.* (1964).

COUNTERSTATEMENT OF THE CASE

The Petitioner asserts (Petition, p. 10), that "[t]he questions involved are questions of law", and that ". . . [n]o facts are in dispute." While the Authority concurs that the matter comes before this Court on matters purely legal, rather than factual, the Authority takes firm exception to the distorted characterization of the relevant facts set forth in the Petition. Accordingly, the Authority sets forth the following counterstatement of the chronology of events which gave rise to these proceedings.

On November 10, 1971, the Authority issued a press release indicating its intention to raise electric rates for various power consumers in the Virgin Islands. Public hearings were held one week later and on December 3, 1971, the Authority implemented the upward adjustment of its electric rates.

The Petitioner, the Virgin Islands Hotel Association (U.S.), Inc. (hereinafter Petitioner), sought injunctive relief from the District Court of the Virgin Islands. The District Court granted the injunction upon concluding that the Authority had abused its powers as described in 30 VIC, § 105(a)(12), by effectuating rates without sufficient information in support thereof and by failing to hold adequate public hearings prior to implementing the rate change. On February 4, 1972, the District Court ordered the Authority to rescind the rate increases, to make an "appropriate" rate study, and to hold public hearings on the proposed increases. The injunction was stayed by the District Court for ten months to avoid possible financial disruption to the Authority.

On appeal by the Authority to the United States Court of Appeals for the Third Circuit, that court modified the judgment of the District Court and remanded the dispute, holding that 30 VIC, § 105(a)(12), contemplated

a "meaningful" public hearing where interested persons could present their views and evidence in support of their views, and that the essential requirements of such a hearing, (*e.g.*, adequate notice, public dissemination of the facts and figures relied upon by the Authority, and an opportunity for those attending the hearing to rebut those facts and figures), had not been provided by the Authority [465 F.2d 1272 (3 Cir. 1972)]. The Court of Appeals agreed that the Authority should be required to hold additional hearings after adequate notice to the public. At the same time, the Court of Appeals specifically found and concluded that 30 VIC, § 105(a)(12), did not require the Authority ". . . to make rate studies as such . . .", as contended by the Petitioner and required by District Court. The District Court's injunctive order was, therefore, modified to eliminate the requirement that the Authority conduct a rate study before adjusting its electric rates.

Although not required to do so under the guidelines set down by the Court of Appeals, the Authority commissioned two additional studies relating to the justification and necessity for a change in its electric rates and ordered the earlier study updated with current data. On July 5, 1972, the Authority issued public notice stating that new hearings would be held and that its updated report would be made available to the public for inspection. On August 12, 1972, the Authority announced that hearings would be held on September 11, 12 and 13. The first new rate study was made available to the public on August 8, 1972, the second on August 28, 1972.

The hearings were held on the announced dates. At each hearing, officials of the Authority commented on the proposed rate changes and representatives of the three engineering firms that prepared the studies of the necessity for a rate increase summarized and discussed their respective reports.

At each session of the hearings, the Authority provided an opportunity for all interested persons to submit written questions which would be answered by either an official of the Authority or a representative of one of the engineering firms employed by the Authority. Further, the Authority provided for the submission of written statements, questions and the presentation of oral statements. All questions submitted were answered and all statements submitted were accepted.

The Petitioner's secretary testified at the second hearing. Counsel for the Petitioner and an expert employed by the Petitioner attended the third hearing.

At that last session of the hearing, Counsel for Petitioner objected to the lack of "trial-type" procedures, but Counsel had no direct evidence to present nor written questions to submit. Instead, Petitioner's Counsel requested and was granted permission to give an oral "offer of proof" of the facts which Petitioner would have established if oral cross-examination had been allowed. Petitioner's Counsel then requested a two-month continuance of the hearing on the ground that such time was necessary for the Petitioner to prepare, and for the Petitioner's expert to examine "additional" and unspecified data allegedly relevant to the "reasonableness" of the proposed rate increase. Notwithstanding the passage of some three months since the initial decision of the Court of Appeals, Counsel admitted that the Petitioner's expert had not been contacted until six days before the last hearing.

Counsel's request for a continuance was denied. Following the hearing, and after consideration of information contained in the rate studies and Petitioner's oral "offer of proof" at the last session of the hearing, the Authority determined that the proposed rate increase was reasonable. The Authority thus adopted a resolution (See Appendix E), which incorporated its findings

and decision and implemented the upward adjustment in rates. The Authority then moved to vacate the injunction, which motion was granted by the District Court, based on both the facts presented at the hearings and the standards established by the Court of Appeals.

Appeal of that order was again taken by the Petitioner to the United States Circuit Court of Appeals for the Third Circuit. The Petitioner there alleged that it had been deprived of procedural due process in the Authority's hearings and that the Authority's decision was based on inadequate information. Finding that the Petitioner's allegations were unsupported, on April 12, 1973, the Court of Appeals affirmed the order of the District Court. On May 23, 1973, the Association's petition for rehearing was denied.

The foregoing chronology is amplified by the Petitioner through statements of conclusions and self-serving facts which are misleading and find no support in any of the decisions or the record below. For example, Petitioner states that:

> All of the [Authority's] reports fell far short of successfully justifying the projected electric revenue requirements in terms of reasonable electric operating costs (including financing costs) and the applicable debt service requirement; they failed to attempt to establish that the increased rate schedules were fair and devoid of undue discrimination. Petition at pp. 7-8.

However, quite to the contrary, the Court of Appeals specifically rejected this contention as follows:

> The Hotel Association contends that the Authority did not have adequate information on which to determine whether or not the rates were reasonable. The essence of this argument is that the Authority does not know how to allocate various expenses between water and power distribution and does not

know how much it costs it to supply power to the various types of power users. However, the three engineering studies introduced at the hearings seem to provide just this type of information. (Appendix G at p. 75a; 476 F.2d at 1269-70.)

The above conclusion, the Authority submits, is unassailable on the basis of the record before this Court. This is particularly apparent in light of the fact that, while it had every opportunity to do so, the Petitioner neglected to engage an expert in timely fashion in advance of the hearings or, in any manner, to demonstrate that the studies performed by and for the Authority were inadequate. Since there was nothing in the record to the contrary, the Authority, and subsequently the District Court and U. S. Court of Appeals for the Third Circuit, were compelled to the conclusion that the rate increase was necessary, justified and fully supported by the hearing record.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY FOUND THAT THE PRINCIPLES OF ADMINISTRATIVE LAW ESTABLISHED BY THIS COURT IN *UNITED STATES* v. *FLORIDA EAST COAST RAILWAY CO.*, U.S. , 93 S. CT. 810 (1973), JUSTIFIED THE NATURE AND CONDUCT, BY THE AUTHORITY, OF THE ADMINISTRATIVE PROCEDURES EMPLOYED HEREIN.

In sustaining the District Court of the Virgin Islands, the Court of Appeals, in both the majority and concurring opinions, relied upon the principles announced recently by this Court in *United States* v. *Florida East Coast Railway Co.*, —— U.S. ——, 93 S. Ct. 810 (1973).

Judge Adams, in the concurring opinion,[1] considered *Florida East Coast Railway* to be dispositive of the issues presented herein. The Authority respectfully submits that Judge Adam's analysis of the decision is correct and urges that this Court apply the principles enunciated in *Florida East Coast Railway* in denying the Petition for Certiorari.

As Judge Adams observed:

> The opinion in *United States* v. *Florida East Coast Railway Co.*, —— U.S. ——, 41 U.S.L.W. 4247 (U.S. Jan. 22, 1973) is the most recent pronouncement by the Supreme Court on the type of proceeding acceptable when an administrative agency promulgates a new rate schedule. The opinion makes clear that, at this time, there is no requirement of a traditional adversary hearing in a broad ratemaking context: such a deficiency is not violative of due process. Appendix G at page 77a; 476 F.2d at 1270.

To review, briefly, the salient features of *Florida East Coast Railway*, the railroad there challenged the establishment by the Interstate Commerce Commission of incentive per diem rates on freight cars. These rates were promulgated after a hearing which did not include several of the elements of an adversary proceeding. Upholding the implementation of the rates, this Court stated that the Commission's procedures satisfied the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and were not inconsistent with previous decisions of this Court interpreting the standards of due process in connection with specific administrative proceedings.

The majority opinion of the Court of Appeals below, while not placing the same emphasis upon the teachings

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[1] Appendix G at p. 76-78a; 476 F.2d at 1270.

of *Florida East Coast Railway* as did the concurring opinion, nevertheless recognized the relevance of that decision to the issues presented herein.

Initially, the majority recognized that, where, as here, ". . . decisions affecting large numbers of persons are likely to be more concerned with general policies than with specific facts and that permitting many persons to cross-examine each witness would make proceedings totally unmanageable . . ."[2], traditional adversary-type hearings are not required. This principle is applicable here since the "generalized" hearing requirements of 30 VIC, § 105(a)(12), are similar to the "generalized" hearing requirements at issue in *Florida East Coast Railway* under applicable provisions of the Administrative Procedure Act.[3]

Again, referencing *Florida East Coast Railway*, the majority noted that:

> ". . . a number of courts have held in cases which, like the one before us, . . . [which involve] complex and technical controversies, that written submissions, possibly supplemented by oral argument, suffice.[4]

The Authority, in the proceedings herein, provided for both written submissions and oral argument on matters which were both complex and technical in nature.

The Petitioner herein attempts to avoid the clear import of *Florida East Coast Railway, supra*, by contending, *inter alia*, that the proceedings herein were "particularized", as opposed to "generalized" in an obvious effort to invoke more formalized procedural requirements

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[2] Appendix G at p. 72a; 476 F.2d at 1268. Citing *Florida East Coast Railway, supra.*

[3] 5 U.S.C.A., § 551 *et seq.* (1957).

[4] Appendix G at p. 73a; 476 F.2d at 1268.

such as those which would be applicable to "particularized" proceedings under the Administrative Procedure Act.[5] Since the Administrative Procedure Act is not applicable here,[6] the Petitioner attempts to wring from prior decisions of this Court a thread of a due process argument and to impose upon the Authority the more stringent hearing requirements applicable to administrative agencies in "particularized" proceedings under the Administrative Procedure Act.[7]

On this basis, the Petitioner contends that the Court below "misconstrued" and "misapplied" *Florida East Coast Railway Company, supra*, in concluding that the proceedings at issue herein were "generalized" rather than "particularized".

The Petitioner further contends that this "misapplication" constitutes reversible error for the curious reason that ". . . the proceeding affects the Authority alone, not a multiplicity of persons subject to regulation". (Petition at p. 11).

The argument is a "red herring" which only serves to demonstrate Petitioner's lack of understanding of the decision of the Court of Appeals. The Court of Appeals, refusing to be drawn into making this distinction, commented that:

> . . . [i]nstead, we rely on the failure of the Hotel Association to have demonstrated the inadequacy of written questions, which were permitted." (Appendix G at p. 74a; 476 F.2d 1269.)

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[5] See Petition at p. 11.

[6] Note: The Court below looked to cases arising under the Administrative Procedure Act for guidance but specifically, and quite correctly, concluded that these proceedings are not subject to that Act. See Appendix G at p. 72a; 476 F.2d at 1268.

[7] See discussion of relevant decisions pertaining to standards of due process in Argument II, p. 12, *infra*.

But even assuming, *arguendo*, that the point is relevant, the Authority submits that the result would be the same. For, whether a proceeding is "particularized" or "generalized" depends upon whether ". . . the proposed agency action affects a small or a large number of persons." (Appendix G at p. 72a; 476 at p. 1268). In raising this point, Petitioner seems to assume that the agency action affects only the Authority. This assumption is absurd since the proceedings affected virtually *every* power consumer in the Virgin Islands, including the Petitioner.

Under these circumstances, the proceedings were obviously "generalized" and, under the teachings of *Florida East Coast Railway, supra*, an "evidentiary" or "trial type" hearing would not have been required even under the more specific procedural standards of the Administrative Procedure Act.

In examining the language of the controlling legislation, 30 VIC, § 105(a), the Court of Appeals found a lack of specificity or detail as to the manner in which hearings are to be conducted by the Authority, and simply concluded that such lack of specificity gave the Authority "greater leeway" in conducting proceedings under 30 VIC, § 105(a). In essence then, the Court of Appeals reasoned that, since the governing statute is silent as to the type of hearing required, the only function of the reviewing Court is to determine whether a hearing held thereunder was "meaningful" within the guidelines established by this Court.

The Court of Appeals did conclude that the Authority's hearings were "meaningful" and were consistent with the requirements of due process. Under these circumstances, the decision of the Court of Appeals below is clearly consistent with the decision of this Court in *Florida East Coast Railway* and should be upheld.

II.

IN SUSTAINING THE DECISION OF THE DISTRICT COURT OF THE VIRGIN ISLANDS TO DISSOLVE THE INJUNCTION AGAINST AUTHORITY'S RATEMAKING PROCEEDINGS, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT A TRADITIONAL ADVERSARY HEARING, INCLUDING THE TAKING OF SWORN TESTIMONY, WAS UNNECESSARY UNDER THE STANDARDS OF DUE PROCESS AND UNDER THE PROCEDURAL REQUIREMENTS OF 30 VIC, § 105(a).

Assuming, *arguendo*, that *Florida East Coast Railway Co., supra*, is not dispositive of the issues presented herein, the hearings and procedures employed by the Authority in the ratemaking process nevertheless meet the requirements of procedural due process as defined in earlier decisions of this Court. Since the provisions of 30 VIC, § 105(a)(12) are silent on the precise nature of procedures and proceedings to be conducted by the Authority and, since the Court below found that the hearings and proceedings challenged by the Petitioner herein complied with the broad guidelines of the applicable statute, the decision below must be affirmed regardless of the applicability *vel non* of the principles established in *Florida East Coast Railway Co., supra.*

Procedural due process in ratemaking hearings is not subject to a single definition and is clearly not synonymous with "trial-type" hearings.[8] The requirements of procedural due process vary with the nature of each hearing and the circumstances that surround it.[9]

Despite these well-established principles, the Petitioner asserts that the Court below rendered:

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[8] See *Morgan* v. *United States*, 298 U.S. 468, 480-481 (1936).

[9] *Hannah* v. *Larche*, 363 U.S. 420, 422 (1960).

> ". . . a shocking decision which jettisons 100 years of case law assuring constitutional procedural safeguards in traditional utility ratemaking proceedings." (Petition at p. 3).

However, an examination of the decisions cited by the Petitioner in support of this sweeping conclusion shows, quite to the contrary, that the decision below is a sound application of principles of administrative and constitutional law developed carefully by this Court in a never ending balancing of the needs of governmental institutions and the rights of those whose lives are affected by governmental decisionmaking.

Opp Cotton Mills v. *Administrator of Wage & Hour Division of the Department of Labor*, 312 U.S. 126 (1941), does not support the Petitioner's proposition that:

> . . . Where administrative actions involve resolution of factual issues concerning particular parties, the established principle, grounded in due process, requires a trial-type hearing.[10]

Opp Cotton dealt with the Fair Labor Standards Act, 29 U.S.C., §§ 201-209, which required industry committees to recommend to the Administrator, minimum wages for an industry after investigating the conditions of the industry, hearing witnesses, and receiving evidence. On the pages cited by the Petitioner,[11] the Court stated that the Committee was not required by the statute to conduct quasi-judicial hearings in reaching decisions. Since the Committee, in *Opp Cotton*, was concerned with factual issues concerning particular parties, the case actually refutes the proposition for whcih it was cited by Petitioner. In *Opp Cotton*, this Court upheld the judgment of the lower court which had sustained the Board Order

[10] Petition at p. 15.

[11] 312 U.S. at 152-153.

on the ground that the Order was supported by substantial evidence.[12] The same reasoning was employed by the Court below in the present case. Thus, no conflict between these decisions exist.

Proceeding on the erroneous assumption that the "principle" of *Opp Cotton* requires a trial-type hearing in all administrative decisionmaking proceedings, the Petitioner then compounds its misunderstanding of *Opp Cotton* by the assertion that, under *F.P.C.* v. *Natural Gas Pipeline Company*, 315 U.S. 575 (1942), this "principle" is also applicable in ratemaking proceedings. However, the *Natural Gas Pipeline Company* case, and particularly the portions thereof cited and relied upon by Petitioner, supports no such proposition.

Natural Gas Pipeline arose under the specific requirements of the Natural Gas Act,[13] which are far more specific as to the hearing procedures which must precede any final order of the Federal Power Commission than those applicable to the Authority under 30 VIC, § 105(a)(12). There, the Court, after observing that the Commission had complied with the procedural requirements of the Act, concluded that:

> . . . The companies cannot complain that they were denied a full hearing because they had not been able to examine on redirect their own witnesses who had not been cross-examined, or because they had no opportunity to cross-examine or rebut witnesses who were not offered by the Commission. (315 U.S. at 584).

Thus, if the *Natural Gas Pipeline* case is relevant at all, it supports the Authority rather than the Petitioner. The Authority followed the broad procedural guidelines established in the statute and delineated by the Court of Ap-

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[12] 312 U.S. at 156.

[13] 15 U.S.C.A., §§ 717 *et seq.*

peals. The Petitioner made no attempt, within the applicable procedures, to challenge the evidence before the Authority or to offer witnesses or evidence in rebuttal. As this Court, in *Natural Gas Pipeline*, observed:

> The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered. [Citations omitted]. (315 U.S. at 584).

Petitioners here urge this Court to take cognizance of evidence not offered or considered except in the form of unsupported conclusions tendered orally by Petitioner's counsel in Petitioner's "offer of proof".

Nor does the decision below conflict with the decision of this Court in *Morgan* v. *United States*, 304 U.S. 1 (1938). The administrative procedure employed in *Morgan* was held to be defective primarily because no notice of the order in question was provided. The Court, in *Morgan*, observed that interested and affected parties were entitled to ". . . a reasonable opportunity to know the claims of the opposing party and to meet them." [14]

The proceedings here under review contain no such procedural defect as was found to be fatal in *Morgan*, since adequate notice was provided. In point of fact, the Petitioner has not seriously contended that the notice issued by the Authority was inadequate or deficient. Petitioner was apparently unable to participate in the hearings as fully as it might have only because it chose to ignore the notice and failed to engage expert assistance until almost the eve of the hearings.

The earlier case entitled, *Morgan* v. *United States*, 298 U.S. 468 (1936), also relied upon by the Petitioner, is compatible with the present case for the same reason. In describing the meaning of a "full hearing" the Court there observed that:

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[14] 304 U.S. at 19.

> There must be evidence adequate to support the pertinent and necessary findings of fact . . . The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that no hearing has been given . . . Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense.[15]

The decision of the Court below meets the *Morgan* test since the central focus of the Court was on how "meaningful" the hearings were, not on the "technical" aspects thereof.

I.C.C. v. *Louisville & Nashville Railroad*, 227 U.S. 88 (1913), similarly offers no support for Petitioner's position. There, the government contended that the order in question need not be supported by substantial evidence.[16] This Court rejected this contention, but, upon examining the full record, found that the order was in fact supported by substantial evidence.[17] The Authority's decision here under review has met the same "substantial evidence" test according to the specific findings of the District Court and Court of Appeals below. Thus, the decision below is entirely consistent with the holding of this Court in *I.C.C.* v. *Louisville*.

Petitioner also relies upon *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937), another case dealing with the alleged impropriety of administrative orders based upon inadequate evidence.[18] The procedural "safeguard" alluded to in *Ohio Bell* is not that of a "trial-type" or "evidentiary" hearing, but

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[15] 298 U.S. at 480-481.

[16] See 227 U.S. at 91.

[17] See 227 U.S. at 100.

[18] See 301 U.S. at 303.

that of ". . . a fair and open hearing." [19] In any event, the hearings in question must be considered "fair" and "open" since the Court below specifically found them to be "meaningful" within the meaning of 30 VIC, § 105 (a) (12).

After incorrectly concluding that all administrative proceedings of the type conducted here require trial-type hearings, the Petitioner compounds its error by concluding that all trial-type hearings require cross-examination.[20] To support this conclusion, the Petitioner relies upon *Market St. Ry. Co.* v. *Railroad Commission of California*, 324 U.S. 548 (1945), which teaches that:

> Due process, of course requires that Commissions proceed on matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal.[21]

While the quotation from *Market Street* would appear to provide support for Petitioner's assertion that due process in administrative hearings requires full cross-examination, the quotation is taken wholly out of context. In *Market Street*, some of the information relied upon by the Railroad Commission in rendering its decision was not in the hearing record and was available only after the hearing in question was completed. The Court noted, however, that the appellant did not contend the information was erroneous or that it could be disproved. The Court then observed that "[I]t does not appear that appellant was in any way prejudiced . . ." by the Commission's reliance on such information.[22]

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[19] Citing *Morgan* v. *United States*, 298 U.S. 469 (1936), and *I.C.C.* v. *Louisville*, *supra*.

[20] See Petition at p. 17.

[21] 324 U.S. at 562.

[22] 324 U.S. at 562.

At this point, the Court made the statement, herein relied upon by Petitioner, to the effect that due process requires cross-examination and rebuttal. But following this statement, the Court observed that:

> ". . . due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with Commissions. We are unwilling to say that such an incidental reference as we have here to a party's own reports, although not formally marked in evidence in the proceeding, in the absence of any showing of error or prejudice constitutes a want of due process." [23]

At best, the Petitioner has relied upon *obiter dicta* from a case which is clearly compatible with the decision of the Court of Appeals below. *Market Street* underscores the essence of the decision below, *i.e.*, that the requirements of due process in administrative proceedings are flexible, that they pertain to substance rather than form, and that a lack of due process cannot be established without a showing of prejudice.

Goldberg v. *Kelly*, 397 U.S. 254 (1970), another case relied upon by the Petitioner to equate cross-examination with procedural due process, is more notable for its language than for its meaning. The unusual facts of *Goldberg* v. *Kelly*, involving a welfare recipient who was without counsel and unable to write effectively, clearly led the Court to conclude that oral cross-examination was essential to assure due process on the peculiar facts of that case. The Court relied strongly on these particular circumstances, and upon the fact that "credibility and veracity are at issue, as they must be in many ter-

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[23] 324 U.S. at 562.

mination proceedings : . ." [24] The Court also pointed out that ". . . the evidence consists of testimony of individuals whose memory might be faulty, or who, in fact, might be perjurers . . ." [25]

The situation in the present case is clearly distinguishable. The information before the Authority was of a highly technical nature and it is doubtful that oral cross-examination of the experts who prepared it would have been any more helpful or served the public interest more than the procedure established and followed by the Authority. The evidence relied upon by the Authority was not the product of the memory of witnesses which might be faulty and neither the credibility nor the veracity of the Authority's experts was challenged by the Petitioner.

While the Court below was "reluctant to hold that cross-examination is never needed" in proceedings conducted by the Authority,[26] the Court nevertheless pointed out that since ". . . the persons who testified did so in their professional capacities, it does not seem particularly significant that they were not under oath".[27] Under these circumstances, the Authority submits that *Goldberg* has little relevance to the present cause.

Thus, the cases relied upon by the Petitioner, far from demonstrating the need for trial-type hearings and oral cross-examination in administrative utility ratemaking proceedings, actually support the decision of the Court below and sanction the conduct of these proceedings by the Authority.

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[24] 397 U.S. at 269.

[25] 397 U.S. at 270, citing *Greene* v. *McElroy*, 360 U.S. 474, 497 (1959).

[26] Appendix G at page 74a, fn. 11; 476 F.2d at 1269, fn. 11.

[27] Appendix G at page 71a, fn. 9; 476 F.2d at page 1268; fn. 9.

III.

ON THE BASIS OF THE FULL RECORD BEFORE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, IT CANNOT BE CONCLUDED THAT THE PETITIONER WAS PREJUDICED BY THE ADMINISTRATIVE PROCEDURES EMPLOYED BY THE AUTHORITY IN THE PROCEEDINGS HEREIN.

The Authority respectfully submits that the Petition for Certiorari herein should be dismissed on the basis of the principles set forth and analyzed in the foregoing Arguments I and II and submits that it is wholly unnecessary, on the basis of the record and decision below, for this Court to examine and pass upon each of the many contrived assertions that the Petitioner suffered prejudice by the administrative procedures employed by the Authority in the proceedings herein. These many spurious complaints were considered and rejected, *seriatum*, by the Court below for good and sufficient reasons.

In the proceedings below, the Petitioner argued that the Authority's hearings were flawed by insufficient notice and inadequate dissemination of the information upon which the Authority relied. The Court below correctly treated this argument for what it is, *i.e.*, an attempt by the Petitioner to extricate itself from a situation brought on by its own inaction and lack of diligence. As the Court of Appeals observed:

> The Hotel Association now complains that notice of about one month was too short. What the Hotel Association in effect asks us to ignore is the district court's injunction which had been stayed for only ten months. As of June 28, when this court handed down its affirmance of that injunction, it was clear to all concerned that the Authority would have to hold new hearings. Moreover, the July 5th press release was sufficient to warn the Hotel Association

> of the need to retain its expert. *Thus, the Hotel Association has only itself to blame for waiting before seeking an expert qualified to present its case.* (Appendix E, p. 71a; 476 F.2d at 1267.) (Emphasis supplied.)

Similarly, the Petitioner contends that it was prejudiced by the Authority's refusal to interrupt the hearings for a two-month period to permit Petitioner to prepare. This assertion, when considered in the light of the facts, is frivolous. The request for a continuance was made at the last session of the hearings, with no prior notice to the Authority and without even a modicum of a showing that good cause existed for the delay. The Petitioner's request was made at the "eleventh hour" despite the fact that the Petitioner had been on notice for some three months and could at least have made the request at the first session of the hearings. Moreover, in making its tardy request, the Petitioner was fully aware of the potential damage which further delay would visit upon the financial health of the Authority.[28]

The remaining procedural objections which the Petitioner here asserts were presented in precisely the same form before the Court of Appeals below. The conclusions reached by the Court below in disposing of those assertions are unassailable in light of the record considered and the Petitioner sets forth no new reasons for this Court to find otherwise.

The Petitioner's other complaints with the decision below may be treated briefly, *seriatum*, as follows:

1) Petitioner objects to the fact that officials of the Authority presided over the hearings. The Court below considered this objection and reasoned that:

> . . . because the Board of the Authority had the responsibility [by statute] for the final decision on the

[28] See, *e.g.*, Appendix G, p. 71a, fn. 8; 476 F.2d 1267, fn. 8.

rate increases, it is not at all evident how having a trial examiner take testimony would have altered that decision in any way. (Appendix G at page 75a; 476 F.2d at 1269).[29]

2) The Petitioner challenges the Authority's decision on the ground that the Authority considered factual material outside of the hearing record. The challenge is based upon the language of the Authority's resolution[30] setting forth its findings and decision. However, as the Court below observed:

> ". . . [t]he Hotel Association's interpretation of this language is contrary to its obvious meaning."[31]

Moreover, the Petitioner has submitted no evidence which would lead to any different conclusion.

3) The Petitioner asserts that it suffered prejudice by the Authority's setting rates in other than a "trial-type" proceeding. In responding to this assertion, the Court below properly recognized that the issue presented was not whether the governing statute required "trial-type" hearings in each case, or in any case, but rather, whether such hearings were required in *this* case. Here, too, the particular circumstances and nature of the hearing were controlling. The Court below noted that the matters raised in the Petitioner's "offer of proof" could as easily and effectively have been formulated into written questions as into oral cross-examination.[32] Thus, since the Petitioner was not prejudiced by the

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[29] Judge Adams, in a concurring opinion, noted his preference for "an impartial presiding officer", but, in the context of the present case, nevertheless concluded that the absence of such an officer did not render the proceedings defective. (Appendix G at p. 78a, fn. 3; 476 F.2d at 1271, fn. 3).

[30] The Authority's resolution is reproduced as Appendix E filed by the Petitioner.

[31] Appendix G at p. 75a; 476 F.2d at p. 1269.

[32] Appendix G, at p. 74a; 476 F.2d at p. 1269.

limitations of the hearings, the Court below correctly concluded that the hearings afforded procedural due process.

4) The Petitioner also contends that the Authority's decision was unreasonable and thus violative of 30 VIC, § 105(a)(12) because it was based upon inadequate information. In this regard, Petitioner claims that the decision below allows the Authority to employ ". . . *any* future cost increase as justification for increasing its electric rates . . . regardless of whether the increased rates are 'reasonable'." [Emphasis in original].[33] The Court of Appeals evaluated this contention and resolved it by examining the engineering reports provided to the public and relied upon by the Authority in determining the need for a rate increase. As observed by the Court of Appeals, the reports in question contain precisely the type of information specified and requested by the Petitioner, and:

> The Hotel Association has clearly failed to demonstrate the type of statutory violation subject to review by this Court. (Appendix G at 75a; 476 F.2d at 1269-70).

Thus, an examination of each objection raised by Petitioner discloses no basis for concluding that the hearings or the information developed therein were inadequate. Since the hearings in question comported with the requirements of due process and since the Authority's resolution implementing an upward adjustment in its electric rates is supported by substantial evidence, no useful purpose would be served by further review by this Court.

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[33] Petition, pp. 20-21.

IV.

IN SUSTAINING THE DISTRICT COURT OF THE VIRGIN ISLANDS, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY RULED THAT THE AUTHORITY VIOLATED NO PRINCIPLE OF CONSTITUTIONAL LAW APPLICABLE TO ADMINISTRATIVE RATEMAKING PROCEEDINGS.

The Petitioner, in another attempt to invoke the protection of the Fifth and Fourteenth Amendments of the Constitution in its attack on the Authority's ratemaking proceedings, asserts that the resulting rates will constitute "unconstitutional takings of property." [34] In support of this contention, the Petitioner makes no attempt to establish that the Authority's proposed rates would be confiscatory. Rather, the Petitioner cites and relies upon *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), and asserts that the latter case establishes ". . . a general principle of constitutional law . . ." which must be followed in all such ratemaking proceedings. In this regard, Petitioner characterizes the requirements of *Natural Gas Pipeline Co., supra*, as follows:

> . . . a determination of reasonable rates *must involve* two basic steps: (1) the adjustment of the general revenue level to cover reasonable operating costs, including financing costs, and the debt service requirement of bond convenants (in the case of publicly-owned utilities); and (2) the adjustment of rate schedules conforming to that level so as to eliminate undue discrimination and unfairness from their details.[35] [Emphasis added].

Petitioner paraphrases, rather than quotes *Natural Gas Pipeline Co., supra*, and, in so doing, misleads the

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[34] Petition at p. 19.

[35] Petition at p. 19.

reader. For this Court did not say that ratemaking proceedings "must" involve the two steps alluded to by the Petitioner but, rather, that such proceedings "often involve" such steps.

In characterizing the second step involved, the Petitioner takes more license than advocacy permits in failing to point out that this Court actually sanctioned the ". . . adjustment of the general revenue level to the demands of a fair return." [36]

When read in proper context, the two steps described by this Court for the adjustment of the general revenue level by utilities is no more and no less than the steps followed by the Authority in these proceedings.

If reference to the proper language from *Natural Gas Pipeline Co.* is not sufficient to dispel the notion that the Authority violated a "general principle of constitutional law", the following language of this Court in *Natural Gas Pipeline Co.* should be conclusive:

> The Constitution does not bind ratemaking bodies to the service of any single formula or combination of formulas.
>
> * * * *
>
> Once a fair hearing has been given proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped.[37]

The Court below not only found that the hearings below were "meaningful" and not violative of the standards of due process, but that the formula employed by the Authority in reaching the decision to increase its

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[36] 315 U.S. at 584.

[37] 315 U.S. at 586.

electric rates was both "fair" and supported by substantial evidence.[38]

As to the belated contention now advanced by Petitioner that the rate level adopted by the Authority amounts to an unconstitutional taking, the Court below noted that:

> Finally, we note that the Hotel Association did not attempt to establish in the Authority's September 1972 hearings or in the subsequent district court proceeding, and does not now urge, that the increase in electric rates is confiscatory. At the district court proceeding held on December 21, 1971, where the Hotel Association challenged the first set of hearings held by the Authority, there was uncontradicted testimony by various witnesses that the electric power bills of Virgin Islands hotels accounted for between four and eight percent of all operating costs (including debt service). With the proposed increase in mind, the district court at that time computed that the rate increases would increase overall operating costs by about two percent an amount which it concluded was not going to put the hotels out of business.[39]

Having wholly failed in its attempt to establish that the Authority's proposed electric rates are "confiscatory" and otherwise in violation of any relevant constitutional or other principles establishes by this Court, or of the provisions of 30 V.I.C., § 105(a), the "constitutional" error alleged and asserted by Petitioner under *Natural Gas Pipeline Co.* and the Fifth and Fourteenth Amendments to the Constitution must be rejected.

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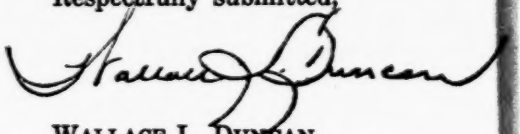
[38] Appendix G at p. 75a; 476 F.2d at 1269.

[39] Appendix G at pp. 75-76a; 476 F.2d at 1270.

CONCLUSION

For each of the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Wallace L. Duncan, hereby certify that on October 12, 1973, the Brief for Respondent In Opposition in the above-captioned proceeding was served upon counsel for the Appellant Virgin Islands Hotel Association, (U.S.) Inc. by mailing multiple copies thereof, postage prepaid, to Isherwood & Colianni, Vincent A. Colianni, Esquire, and Evelyn N. Cooper, 40 King Street, Christiansted, St. Croix, U.S. Virgin Islands 00620.

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October 12, 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-486

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.), INC., a corporation, *Petitioner*

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF

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November 1, 1973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-486

Virgin Islands Hotel Association (U.S.), Inc., a corporation,

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v.

Virgin Islands Water & Power Authority,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF

I. New and Erroneous Allegations of Fact Underlie Arguments Presented in Brief for Respondent in Opposition Regarding the Authority's Hearing Procedure. They unfairly impute Waiver to Petitioner.

1. Inadequate notice. Respondent states (Br., p. 15) that Petitioner

"chose to ignore the notice and

> [thus] failed to engage expert assistance until almost the eve of the hearings." (Emphasis added)

There is no evidence whatsoever that Petitioner ignored the hearing notice. On the contrary, Petitioner watched the Authority's announcements and releases closely to determine whether there was need to incur the expense of hiring a rate expert.

The Authority's July 5th release, stating that there would be additional hearings, said "no new studies" were required by the court of appeals' June 28th decision. On August 8th, however, the Authority released the updated Jackson & Moreland report and the Beck rate and operations "review" report.

The latter was new; it was a post facto attempt to justify the increased rates as "reasonable." Petitioner's Board members spent two weeks reviewing it. On August 30th, after the Petitioner had lost the third week preparing for a meeting which the Authority had misled it into believing would be for settlement discussion, Petitioner authorized the hiring of a rate expert. Allowing a reasonable time for analysis of the reports released on August 8th, Petitioner thus had approximately three weeks in which to make technical preparation for the hearings.

2. Denial of cross-examination. In defense of the Authority's substitution of written questions for cross-examination, a procedure strange to the Virgin Islands as to which the Authority had given no notice during the 2 months between the hearing announcement and first hearing, Respondent

argues (Br., p. 19) that "[t]he information before the Authority was of a highly technical nature" and Petitioner had challenged "neither the credibility nor the veracity of the Authority's experts."

Petitioner, however, did challenge the credibility and veracity of the author of the Beck report, particularly; it also objected to the Authority's failure to have its experts sworn. In this connection, it should perhaps be noted that Petitioner's counsel inquired, in advance of the hearings, as to the type of hearings contemplated by the Authority and was misled by an Authority spokesman who said they would be "evidentiary."

These and other allegations of dereliction by Petitioner are, in fact, irrelevant to this Court's action on the Petition. It was Respondent's withholding of requisite data that caused the denial of procedural due process. The procedural limitations imposed by the Authority were essential to its strategy of nondisclosure.

There is absolutely no basis for Respondent's implications of waiver by Petitioner.

II. Brief for Respondent in Opposition Presents New Legal Arguments Which Are Untenable.

1. In response to Petitioner's contention of a denial of procedural due process, Respondent says (Br., p. 18) the essence of the decision below is

> "that the requirements of due process in administrative proceedings are flexible, that they pertain to substance rather than form, and that a lack of due process cannot be established without a showing of prejudice."

This is a misstatement of "the essence" of the decision below. It is an argument for procedural fluidness and formlessness in administrative proceedings consonant with administrative permissiveness, not due process of law.

Respondent seems to say, in effect, that in order to challenge unconstitutional hearing procedures, the complaining party must claim and show prejudice; that Petitioner's claims of illegal procedure are claims of prejudice, but Petitioner has failed to present proof of prejudice; and, therefore, that it has not established denial of due process. This position does not warrant comment; it suffices to unmask it.

2. In Response to Petitioner's argument that the Authority lacked adequate information on which to determine that the increased rates are "reasonable," Respondent contends (Br., pp. 7, 23) the court below held the Authority's decision to be supported by substantial evidence because it found that the engineering studies presented by the Authority "seem to provide" (emphasis added) the required information. From this, Respondent deduces that the information presented by the Authority's experts was adequate for a valid rate determination.

However, the equivocal remark of the court of appeals on which Respondent relies is not a holding that the Authority's conclusion was supported by substantial evidence. The real fallacy of Respondent's position is to be found in its statement (Br., p. 7) that the said remark

> "is unassailable on the basis of the record before this Court. This is particularly apparent in light of the fact that,

> while it had every opportunity to do so, the Petitioner neglected ... in any manner, to demonstrate that the studies performed by and for the Authority were inadequate. Since there was nothing in the record to the contrary, the Authority, and subsequently the District Court and U.S. Court of Appeals for the Third Circuit, were compelled to the conclusion that the rate increase was necessary, justified and fully supported by the hearing record." (Emphasis added)

3. Respondent also erroneously argues that Petitioner asserted that the Authority's increased rates "will constitute 'unconstitutional takings of propperty'" (Br., p. 24). The question whether or not the increased rates are confiscatory is a substantive issue which was introduced by the court below; it was not raised by Petitioner. Petitioner considers the question premature because of the incomplete state of the record.

For these further reasons, Petitioner urges, the decision below should be reviewed and reversed.

Respectfully submitted,

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